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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXL

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# AMERICAN STATE REPORTS.

VOL. LXI.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CONNECTICUT.**

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**CURTIS v. GRANITE STATE PROVIDENT ASSOCIATION.**

[69 CONNECTICUT, 6.]

**BUILDING AND LOAN ASSOCIATIONS, EFFECT OF INSOLVENCY UPON EXISTING MORTGAGES TO.**—Upon the appointment of a receiver of a building and loan association on the ground of its insolvency, the loans made by it to its members and mortgage notes given by them to it become immediately due, regardless of the time of payment specified therein.

**BUILDING AND LOAN ASSOCIATIONS, EFFECT OF INSOLVENCY UPON THE RIGHT TO COLLECT PREMIUMS.**—Upon the insolvency of a building and loan association and the appointment of a receiver of its assets, it is, for all practical purposes, prematurely dissolved, and premiums remaining due and payable as bonuses for granting loans become uncollectible, because the promise to pay such premiums was made upon the implied condition that the association should remain a going concern.

**BUILDING AND LOAN ASSOCIATIONS, INSOLVENCY, DISPOSITION TO BE MADE OF PREMIUMS PAID.**—Upon the insolvency of a building and loan association and its practical premature dissolution thereby, borrowers who have made payments of premiums in consideration of receiving their loans are entitled to be credited with the amount of such premiums in reduction of their indebtedness.

**BUILDING AND LOAN ASSOCIATIONS, INSOLVENCY, DISPOSITION TO BE MADE OF DUES PAID BY MEMBERS.**—Upon the insolvency of a building and loan association and its practical dissolution by the appointment of a receiver, members indebted to it who have paid the dues upon their stock are not entitled to be credited the amount of such payments in reduction of their indebtedness. They must suffer their share of the loss of the association, and all they can be permitted to receive on account of their payment of dues on their stock is a pro rata dividend with the nonborrowing members of such assets as may remain after the satisfaction of the debts of the association.

Sidney E. Clark, for the petitioner.

Charles A. Safford, for two of the respondents.

7 TORRANCE, J. This is a petition by the receiver in the cause above named for instructions relating to certain questions arising in the performance of his duties. The superior court found the facts stated in the petition to be "true, sufficient, and material," and reserved the case for the advice of this court.

The material facts alleged may be summarized as follows: The Granite State Provident Association is a New Hampshire corporation, which began business on the plan of a building and loan association in the spring of 1888. It consists of about eighteen thousand members. Of this number about seventeen hundred are borrowers, while the remainder are not borrowers; and these two classes are termed "borrowers" and "investors" respectively. About sixty members of the association, residents of this state, have borrowed money of the association and given mortgages on real estate here to secure the same. By its charter the association carried on business solely on the mutual plan. "Each person becoming a member subscribed for and took one or more shares, and there was delivered to him a certificate of stock representing the number of shares owned by him. The nominal par value of each share was two hundred dollars. Such a member paid one dollar a month to the association, or twelve dollars a year. Such payments, solely on shares, <sup>s</sup> were termed dues. As a penalty for not making his monthly payments or dues, he was liable to a fine. It was estimated that at the end of eight years, from such payments, fines, and all other kinds of investments and profits, the association could pay back to each investor two hundred dollars for each share, and deliver up to each borrower any mortgage held by the association against him. Anyone desiring to borrow money of the association must first become a member, or an investor, and must subscribe for a number of shares whose aggregate par value would be equal to the face of the second mortgage. The member gave a first and second mortgage for his loan. The first mortgage was for such an amount as would readily facilitate its sale by the association to third parties; nearly all of which mortgages in this state have been sold in this way. The association indorsed the notes and is held liable on the same at this time. The first mortgage might comprehend the whole amount loaned, providing the security was good enough to warrant it. The member at the same time he gave his note also gave a second mortgage on the premises to the association, which the association always held. In this second mortgage, the borrower agreed to pay a certain amount each month on each share held by him, until his shares should each be worth two hundred dollars, when his mortgage would be delivered to him and canceled.

He also agreed to pay all insurance and taxes on the property mortgaged, and to assign his shares to the association as additional security. In this second mortgage, the association agreed to pay the note secured by the first mortgage, according to its tenor, and to deliver said first mortgage, properly canceled of record, to the borrower. The first mortgage note usually ran five years. Many of said notes, however, in the state of Connecticut, are demand notes. In making these loans to members, one of two plans was adopted. One was called the gross premium plan, and the other was called the cash premium plan. The loans made in Connecticut were on the cash premium plan. On this plan a certain amount of money was advanced to the borrower as a loan, upon his taking the requisite number of <sup>9</sup> shares, upon which he paid a certain amount each month as interest on the whole loan, a certain amount each month as premium, and a certain amount each month as dues on his shares. For example, if a member was advanced the amount of eight hundred dollars, he pays four dollars dues, monthly, on four shares, which are assigned as additional security for the loan; four dollars per month, which is interest at six per cent per annum, on the amount actually advanced; and usually two dollars per month, which is called the cash premium, which is three per cent per annum on the amount actually advanced. The borrower received eight hundred dollars in cash, and paid a total of ten dollars per month on his loan. He has paid the dues on his shares like all investors. In addition to this, he has paid six per cent interest on the money actually advanced to him, and three per cent interest on the amount advanced as a cash premium."

On March 18, 1896, upon the petition of the bank commissioners of the state of New Hampshire, the association was enjoined from doing any more business, an assignee was appointed in that state, and its business and affairs are now being wound up there. On May 29, 1896, the petitioner was duly appointed receiver of the association in and for the state of Connecticut, and is now acting as such.

Since his appointment, no dues have been paid to him from any of the members, but a small number of the borrowers here have made payments to him equal to the interest and premium on the amount of the loan. A large number of the borrowers here have made no payments to him whatever, and he has been obliged in several instances to pay interest to the holders of the first mortgages, "for the purpose of retaining the interest of the association in the second mortgage held by the contracts of the association." The mortgages taken by the association on



real estate here are now in the petitioner's hands as part of its assets.

The petitioner prayed for instructions "in the performance of his duties as such receiver, upon the following questions arising upon the facts hereinbefore set forth: 1. Do all <sup>10</sup> mortgages held by the association against its members become due by the appointment of the receiver, regardless of the times or terms of payment set forth in the same; and are the mortgages held by your petitioner in the state of Connecticut due because of this appointment, and regardless of the times or terms of payment set forth therein? 2. Can the receiver collect of the borrower any more than the amount actually advanced, or, in other words, can the cash premium be collected? 3. Should the cash premium paid previous to March 18, 1896, be applied on the amount actually advanced, or be retained according to the tenor of the contract, to that date?"

The first question is, perhaps, broad enough in its scope to include matters the decision of which might affect the rights of persons who were not made parties to this proceeding, but, if so, we must limit it to matters affecting the rights only of such as are parties. Limited in this way the question, in effect, is whether the mortgages held by the receiver upon real estate here can now be enforced by him for the purpose of collecting the assets and winding up the affairs of the association here; and we are of opinion that this must be answered in the affirmative.

So far as the second mortgages are concerned, they provide that upon a certain contingency—the nonpayment of dues—which has happened, the mortgages may, at the option of the mortgagee, its successors or assigns, at once be foreclosed. But we do not rest our answer to this first question upon any provision of this kind, nor upon any breach of the mortgage condition in either the second or the first mortgage; we rest it on the broad ground that the association has been, in effect and for all practical purposes, prematurely dissolved.

It is now well settled that upon the premature dissolution of an association of this kind, or upon its becoming insolvent and unable to carry out the purposes for which it was created, and passing into the hands of a receiver for the purpose of having its affairs wound up—which is, in practical effect and operation, a dissolution—the borrowing members may be compelled to pay forthwith the balances due from them <sup>11</sup> on their securities, although the latter in terms only provide for payment by installments extending over a definite period of time: Wind-

sor v. Bandel, 40 Md. 172, 177; Waverly Mut. etc. Assn. v. Buck, 64 Md. 338, 347; Lowe Street Bldg. Assn. v. Zucker, 48 Md. 448; Hoboken Bldg. Assn. v. Martin, 13 N. J. Eq. 427; Strohen v. Franklin etc. Loan Assn., 115 Pa. St. 273; Buist v. Bryan, 44 S. C. 121; 51 Am. St. Rep. 787; Towle v. American Bldg. etc. Soc., 61 Fed. Rep. 446; Endlich on Building Associations, 2d ed., sec. 523.

The facts in this case clearly show that, so far as the present members of the association are concerned, whether borrowers or investors, the association is to all intents and purposes practically dissolved and defunct; and that its existing contracts with the Connecticut borrowers, as expressed in these mortgages, or otherwise, can no longer be carried out. The case, therefore, comes within the established rule in such cases, and the mortgages can now be enforced in the process of winding up.

The second question is whether the receiver can collect the cash premiums, accruing under the terms of the mortgage, after the association went into the hands of an assignee; and we are of opinion that this must be answered in the negative.

The loans in this state were all made on the cash premium plan; that is, the borrower paid each month, in addition to the interest on the money borrowed and the amount due upon his shares, a further sum in cash, called a cash premium, in the nature of a bonus. The agreement of the borrower in an association of this kind, to pay dues, interest, and premium, is made upon the implied condition that the association shall remain "a going concern." The premium is, in effect, a bonus charged to a member wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the end of the period contemplated by the parties to the transaction: Endlich on Building Associations, 2d ed., sec. 399. When an association before that time becomes insolvent and goes into the hands of an assignee or receiver for <sup>12</sup> the purpose of winding up and putting an end to it and its business, it can no longer perform its part of the mutual agreement, the borrower is deprived of the privileges for which he agreed to pay the premium, and so the consideration for that agreement entirely fails. Under such circumstances, the promise to pay premiums ought to be regarded as no longer binding, and so are the authorities: Cook v. Kent, 105 Mass. 246; Endlich on Building Associations, 2d ed., sec. 523 et seq. See, also, the cases hereinbefore cited. In the case at bar, the receiver is not

entitled to collect premiums accruing after the association went into the hands of the New Hampshire assignee.

The last question is in form limited to the application of the premiums paid prior to the appointment of the New Hampshire assignee, but in his brief the receiver treats the question as if it related to the application of dues as well as premiums, paid before that time, and we will consider the question as if it embraced both dues and premiums.

With reference to the premiums, the question is, whether they shall be applied in favor of the borrower in reduction of the mortgage indebtedness, or whether they shall belong to the association as was contemplated in the agreement. If the association had lived to fulfill the purposes contemplated by the parties to these mortgages when they were made, there is no doubt that the premiums would have belonged to the company, and would not and could not have been applied in reduction of the mortgage debt; but, upon the practical dissolution of the association, the weight of reason and of authority leads to the conclusion that no part of the premium should belong to the company, but should be applied in reduction of the debt, because the consideration for the promise to pay premiums utterly fails. "Upon the basis of all the decisions examined, it may be safely laid down that the clear weight of authority rejects the enforcement of any part of the premium. And in reason and fairness this must be so. The premium is not a payment in advance. The contract concerning it is, that it shall be made up by the borrower in the association's hands, and that, upon his final settlement <sup>13</sup> with the association, when the work of both shall be accomplished and their reciprocal duties fulfilled, it shall be relinquished to and appropriated by the association. The contract, therefore, is an entire one. It does not contemplate a stoppage at any intermediate point and an apportionment of the premium accordingly. No part of it is earned until the whole scheme has been carried out. . . . Hence, if at any stage, the society, breaking down, fails to perform its part of the bargain, the promise to pay it the premium loses the consideration upon which it was based, and ought to be regarded as wholly abrogated. To attempt to apportion the premium is simply to treat it as additional interest. To regard it as something with which the borrower has parted, as something which the society has earned, as assets in its hands before it has done that which entitles it to retain the premium, is to misconceive its true character and office": Endlich on Building Associations, 2d ed., sec.



531. See, also, the authorities hereinbefore cited under the other points in the case.

Treating the premiums in the case at bar, then, just as the parties in the case do, as premiums in the proper legal sense, and not mere payments of interest under the name and guise of premiums, we are of opinion that the premiums paid prior to the appointment of the New Hampshire assignee are to be applied in favor of the borrowers as payments upon the money actually advanced to them.

With reference to the dues paid upon the shares prior to the appointment of the assignee, we are of opinion that they should not be applied in reduction of the amount actually advanced to the borrower. The Connecticut mortgagors stand in a double relation to the association; they are members—investors—as well as borrowers. As members they are bound to contribute to the losses and expenses of the common enterprise. If the amount of dues paid in by them as members is credited back to them as debtors, they will receive in full the amount paid upon stock, while the other members who have not become borrowers may receive only a small percentage of the amount paid in by them. “The insolvency of a company, as before observed, puts an end to <sup>14</sup> its operation as a building association; to a certain extent, it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors, and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw either upon borrowers or nonborrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a pro rata dividend with the nonborrower for what he has paid upon his stock. He will thus be obliged to bear his proper share of the losses”: *Strohen v. Franklin etc. Loan Assn.*, 115 Pa. St. 273; *Towle v. American etc. Soc.*, 61 Fed. Rep. 446; *Endlich on Building Associations*, 2d ed., sec. 523; *Rogers v. Hargo*, 92 Tenn. 35; *Goodrich v. City Loan etc. Assn.*, 54 Ga. 98. The cases upon this last point are not in harmony, some of them holding a doctrine contrary to that announced in the authorities last above cited: See case of *Buist v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 787, and authorities therein cited; extended note to 69 Am. Dec. 162, par. 6, et seq. But we think the former is the sounder rule of the two, and should be adopted in the present case as it is presented upon this record.

The superior court is advised: 1. That the mortgages in the hands of the receiver are now enforceable as against members of the association; 2. That premiums, after the assignment in March, 1896, cannot be collected; 3. That premiums paid prior to the appointment of the receiver should be treated as payments upon the sum due under the mortgage; and that dues so paid should not be so treated, but, so far as the mortgages are concerned, should be treated as if paid by nonborrowing members.

In this opinion the other judges concurred.

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**The Effect of Insolvency of Building and Loan Associations on the Rights and Liabilities of their Members.**

*General Scheme of.*—The corporations commonly known as building and loan associations do not, as the name would imply, engage directly in the business of building. They are strictly loan associations and conduce to the erection of buildings in so far only as they afford facilities to their members, and sometimes to third persons, of borrowing moneys with which lands may be purchased or buildings erected. The usual scheme or plan of such associations is, that the members shall pay into the treasury thereof a stated sum weekly or monthly for each share of stock issued, and that such payments shall be continued until therefrom and from premiums, fines, interest, and other sources of profit the capital of the corporation shall be sufficient to pay upon each share of stock a sum previously agreed upon, at which period each stockholder shall be entitled to have his share so paid to him and to withdraw from the association, and sometimes provision is made authorizing withdrawal before this period upon payment to the withdrawing stockholder of the amount paid in by him and his share of the profits, ascertained in some mode fixed by the constitution or by-laws. Persons wishing to borrow money are usually required to compete therefor by offering a premium for the privilege of receiving the loan. This premium is sometimes required to be paid in advance, and sometimes the amount thereof is only ascertained in advance and its payment is made in monthly installments. Each borrower is usually required to have such an amount of stock as will, if the corporation is successful in realizing its plan, finally reach a value sufficient to discharge his loan, and this stock must be transferred to the corporation as collateral security for the repayment of the loan. As it is especially important to the business of the corporation that the moneys due to it monthly, or at other stated periods, should be promptly paid, such payment is usually coerced by imposing fines upon persons in default; and the moneys paid into the corporation are realized, therefore, from payments of dues, of premiums, of fines, and of interest upon the loans made.

If building and loan associations should keep strictly within the purpose for which they are organized, it is difficult to conceive how they could become insolvent, for their only creditors should be the members or stockholders, and the securities taken should constantly



become more ample through the diminution of the indebtedness resulting from the monthly payments of interest and premiums. The history of these associations, however, shows that they have been drawn into speculation, and that their officers, instead of relying solely upon the natural sources of supply of capital to be loaned, have hypothecated their notes and mortgages to secure additional funds for loaning, and, through mismanagement or a shrinkage in the value of the securities, the corporation has become insolvent and been placed in the hands of a receiver, or otherwise been rendered unable to proceed, and then the question is presented, What is the result upon the rights and liabilities of the members or stockholders of such insolvency, involving, as it necessarily does, an abandonment of the scheme of the corporate enterprise? Usually, the loans have been made payable at a period when, according to the expectation of the members, the stock pledged would be equivalent in value to the amount of the loan, and thus the obligation would be canceled without any direct payment of money.

*Right of the Corporation to Voluntarily Discontinue.*—As the premature dissolution or discontinuance of the business of the corporation must necessarily disappoint the expectation of its members and impair their rights, the corporation itself has no authority to discontinue its business until the shares of stock have become worth the sum provided for in the by-laws or articles of incorporation: *Barton v. Enterprise etc. Assn.*, 114 Ind. 226; 5 Am. St. Rep. 608; *Sumter Bldg. etc. Assn. v. Winn*, 45 S. C. 381; nor can the legislature, by an amendment of the laws upon the subject, authorize such premature dissolution or winding up as against the protest of the stockholders whose rights have accrued prior to the enactment of the amendatory statute: *Fisher v. Patton*, 134 Mo. 32.

*Rescission upon Insolvency.*—Where the premature winding up or dissolution of the corporation is the result of its insolvency and the appointment of a receiver, or from such other circumstances as make it clear that the corporation can no longer continue in business and that the expectations of its members can never be realized, the courts, so far as possible, treat this changed condition of affairs as equivalent to a rescission and as terminating the contract between it and its members. This contract, either express or implied, is to the effect that the member will pay dues, premiums, and fines, and that he will repay any loan made to him by the corporation as stipulated for in the note or other evidence of indebtedness given to it by him. These obligations are either extinguished or varied, and the courts thereafter either refuse to enforce them at all or enforce them in a manner which seems equitable under the changed conditions resulting from the insolvency: *Low etc. Assn. v. Zucker*, 48 Md. 448; *Waverly etc. Assn. v. Buck*, 64 Md. 338; *Knutson v. Northwestern etc. Assn.* (Minn.), 69 N. W. Rep. 889; *Strohen v. Franklin etc. Assn.*, 115 Pa. St. 273. It will hence happen that while the members are absolutely relieved from some obligations, others are enforced at an earlier date and in a more onerous manner than if the corporation had not become insolvent.

*Dues and Premiums.*—The obligation of a member to pay dues upon his stock is entered into in the expectation that the corporation will proceed in business until from such payments and from other sources the stock will become of the par value fixed by the articles of the association, and the payment of premiums is made, or promised to be made, under the agreement that the borrowing member shall have the use of the moneys borrowed until the time at which he promised to repay them. When it becomes certain that the corporation must be wound up, there is no consideration for the further payment either of dues or of premiums, because it is ascertained that the stock is not thereafter to be enhanced in value, and that the moneys borrowed cannot be retained by the borrower until the time originally contemplated, but that he is under an obligation to repay them at once. Hence, after insolvency, neither the corporation nor its receiver is entitled to enforce subsequently accruing liabilities either for dues or premiums: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; ante, p. 17; *Peter's etc. Assn. v. Jasksch*, 51 Md. 198; *Cook v. Kent*, 105 Mass. 246; *Buist v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 787. This remains true, though the stockholder is also a borrower and has executed to the corporation a mortgage or other instrument in writing wherein he has expressly agreed to pay weekly dues and fines until the association should have a sufficient fund to pay the holders of unredeemed shares of stock the sum of one hundred dollars per share clear of all losses and liabilities: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; ante, p. 17; *Low etc. Assn. v. Zucker*, 48 Md. 448.

*Loans become Immediately Due and Collectible.*—The obligation of a borrowing member to repay the amount loaned him is, after insolvency, no longer controlled by the evidence of indebtedness given by him, but becomes enforceable at once; and the corporation or its receiver may, therefore, immediately proceed to foreclose all mortgages given to it, though by their terms, or the terms of the notes referred to therein, they are not collectible until some date far in the future: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; ante, p. 17; *Strauss v. Carolina etc. Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585; *London etc. Soc. v. Morgan* (1893), 2 Q. B. 266.

*Premiums, Credit to be Given for.*—As borrowing members, upon the insolvency of the corporation, are liable for the immediate payment of loans made to them, it follows, as we have already suggested, that it becomes inequitable for them to continue the payment of those premiums agreed to be paid in consideration of the making of the loan, and equally inequitable that the corporation or its creditors should have the benefit of the whole premium where it has been paid in advance. When the loan was made, it was contemplated that the borrowers, in its payment, should have credit for the value of the stock held by them, but, after the corporation has become insolvent, this credit cannot be allowed without relieving the borrowing stockholders from their liability for the debts of the corporation which they should share equally with stockholders who are not borrowers from it. Therefore, it is clear that the borrowing stockholder cannot be credited for any dues paid by him upon his

stock: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; ante, p. 17; *Hekelnkaemper v. German etc. Assn.*, 22 Kan. 549; *Rogers v. Rains* (Ky.), 38 S. W. Rep. 483; *Waverly etc. Assn. v. Buck*, 64 Md. 338; *Buist v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 878; *Post v. Building etc. Assn.*, 97 Tenn. 408. As to premiums, the weight of authority is to the effect that he is entitled to be credited with all premiums actually paid by him, and that there cannot be any apportionment of the premiums made against him, although he has had the use of the moneys loaned for a considerable period, and, therefore, has received, at least, a part of the benefit which constituted the consideration of the payment of the premium: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; ante, p. 17. In Illinois, however, it is insisted that the borrowing member is not entitled to be credited with premiums paid by him: *Choisser v. Young*, 69 Ill. App. 252; *Towle v. American etc. Soc.*, 61 Fed. Rep. 446. The general theory of the cases, as we understand them, is to place borrowing and nonborrowing stockholders on the same terms and to refuse to permit the crediting of the former with any amount paid in by them as dues on their stock, for the reason that during the same time equal dues have been paid by the nonborrowing stockholders, and neither of them should be permitted to withdraw any part of their stock or the payments made thereon from the corporation to the prejudice of the other or of its creditors. As to loans made to the borrowing stockholder, on the other hand, as the scheme cannot be carried out, such exactions as have been made of them must be restored, and they placed on substantially the same ground as if they had borrowed the sum actually received from the association and no more, and had agreed to pay interest thereon. They are therefore charged only with such sum and interest, and are credited with such payments as they have made other than the dues upon their stock. Thus it was said in *Strohen v. Franklin etc. Assn.*, 115 Pa. St. 273: "The insolvency of the company puts an end to its operations as a building association; to a certain extent it also ends the contract between it and its members respectively, and nothing remains but to wind up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or nonborrowers more than their respective shares. That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled after the debts of the corporation are paid, to a pro rata dividend with the nonborrower for what he has paid upon his stock."

*Interest, Return of.*—In Maryland, the borrowing stockholder is also entitled to be credited with all interest paid by him according to the terms of his mortgage, he being charged upon such mortgage interest, not at the rate specified therein, but at the rate of six per cent per annum only: *Windsor v. Bandel*, 40 Md. 172; *Low etc. Assn. v. Zucker*, 43 Md. 448; *Waverly etc. Assn. v. Buck*, 64 Md. 338. These decisions are based upon the assumption that the agreement to pay interest had been given in consideration that the loan should continue for the time specified in the notes and mortgages, and this expectation not being realized, it was not equitable to charge more than



legal interest: See, also, *Strauss v. Carolina etc. Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585; *Buist v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 787.

*Dues, Credit of, Decisions Allowing.*—In two of the states, at least, the rule that a borrowing stockholder should not be credited with the dues paid upon his stock has been repudiated. Thus it has been said in South Carolina: "The authorities establish the following propositions: 1. That the appointment of a receiver terminates the contract with the mortgagor, as originally contemplated; 2. That the mortgagor, who is also a shareholder, is not liable for monthly dues accruing after the appointment of a receiver; 3. That upon the determination of his contract with the association, as originally contemplated, the mortgagor is entitled as credits on his mortgage, both for the amounts paid as interest, and also as dues on his shares of stock; 4. That where the accounts paid by the mortgagor as interest and dues aggregate a sum equal to the amount the mortgage was given to secure, a complaint for foreclosure of mortgage will not be sustained; 5. That if the association goes into the hands of a receiver before the interest on the amount actually advanced, at the rate specified in the contract, and for the length of time the contract was in full force and effect, equals the amount of the premium, then the amount due under the mortgage is to be ascertained by calculating interest on the amount actually advanced, at the rate agreed upon, for the length of time the contract remained of force as originally entered into, and deducting from such amount all payments of interest and dues; the amount paid as interest and dues not to bear interest. In such a contract as this, the interest would be calculated at the rate of ten per cent per annum; 6. That assignment and transfer of shares of stock by the mortgagor as collateral security for the loan, and consolidating the interest and dues in the mortgage, show that the amount paid monthly, consisting of interest and dues, is to be regarded as what is called "redemption money," and raises an implied agreement that such payment shall be credited on the mortgage": *Buist v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 787. Substantially the same rule exists in North Carolina, where, in one of its most recent decisions the court said: "In making collections of the borrowing members, they should only be charged with the amounts they have received: *Endlich on Building Associations*, secs. 527, 528. And under our statute, as construed in *Rowland v. Old Dominion etc. Assn.*, 115 N. C. 825, 116 N. C. 887, and *Meroney v. Atlantic etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, these borrowing members can only be charged six per cent interest on the amounts they received from the time they received them, and are entitled to credits on the amount for all they have paid into the concern since they borrowed the money, whether it was called fines, penalties, weekly dues, or by any other name. The nonborrowing members will be entitled to have interest computed on the amounts due them at the rate of six per cent. The receivers should be fully empowered by order of court to proceed to collect in the funds of the concern, and to do any other necessary act for the benefit of the concern, to employ attorneys, if necessary, whose pay must be fixed by the court. The appointment of the receivers of this insolvent corporation caused the debts and mortgages

due the concern to mature, and they must be collected at once": *Strauss v. Carolina etc. Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585. It seems manifest to us that where decisions like these prevail, the borrowing members, by receiving credit for everything paid by them, are substantially permitted to withdraw from the corporation and to leave the nonborrowing members, if any, to discharge its liabilities. If there are no creditors of the corporation, there may, perhaps, be no impropriety in adjusting the liabilities of the borrowing stockholders in the manner indicated by the South Carolina and North Carolina decisions. Thus it was held in England that a borrowing member, where there were no outside creditors, was entitled, after a winding up order had issued, to discharge his liability by paying the difference between the amount received by him and interest and the installments paid by him with interest: *Brownlie v. Russell*, 8 App. Cas. 235; *Tosh v. North British etc. Co.*, 11 App. Cas. 489. In other words, these cases affirm that the borrowing members are not obliged to remain in the corporation for the purpose of responding for their share of the losses suffered by it, there being no outside creditors; but in a later case where there were outside creditors, it was held that borrowing members were liable to be placed on the list of contributors, and, as such, held answerable with other stockholders to the outside creditors of the corporation: *London etc. Soc. v. Morgan*, (1893), 2 Q. B. 266.

*Liability of the Stockholders.*—Unless the North Carolina and South Carolina cases already cited may be regarded as establishing an exception to this rule, the liability of borrowing and nonborrowing stockholders of a building and loan association for its obligations is the same. The borrowing stockholders must discharge their liabilities existing in favor of the corporation by reason of loans made to them by it. If there remain assets of the corporation after discharging its liabilities, such assets must be shared by the borrowing and nonborrowing stockholders according to the number of shares held by each. If, on the other hand, the assets of the corporation are not sufficient to discharge its liabilities, the borrowing and nonborrowing stockholders are equally liable to contribution for the deficiency. In other words, in all cases, the general or outside creditors of the corporation must first be paid before any stockholder, whether borrowing or nonborrowing, can participate in any distribution of the assets: *Gibson v. Safety etc. Assn.*, 69 Ill. App. 485; *Steinberger v. Independent etc. Assn.*, 84 Md. 625; *Knutson v. Northwestern etc. Assn.* (Minn.), 69 N. W. Rep. 889; *Eversmann v. Schmitt*, 53 Ohio St. 174; 53 Am. St. Rep. 632; *Christian's Appeal*, 102 Pa. St. 184; *Post v. Building etc. Assn.*, 97 Tenn. 408; *Towle v. American etc. Assn.*, 75 Fed. Rep. 938. Both the North Carolina and the South Carolina decisions, notwithstanding they require a borrowing member to be credited with the dues paid in by him, seem to recognize his continuing liability for his share of any deficiency in the assets of the corporation (*Buist v. Fitzsimons*, 44 S. C. 130), and therefore that if, on a sale of the mortgaged property, a sum is realized in excess of the mortgage debt, that such sum need not be paid to the mortgagor until he has contributed his share of the liabilities of the corporation: *Meares v. Davis*, 121 N. C. 126.



**Withdrawals.**—Where the by-laws permit members to withdraw from a building and loan association upon terms therein specified, and such withdrawal is made in good faith before the association is ascertained to be insolvent, the stockholders thus withdrawing are relieved from all further liability, though it is subsequently ascertained that the corporation is insolvent: *Wangerien v. Aspell*, 47 Ohio St. 250; *Eversmann v. Schmitt*, 53 Ohio St. 174; 53 Am. St. Rep. 632; *In re Doncaster etc. Soc.*, L. R. 3 Eq. 158. One, however, who has merely given a notice of his intention to withdraw has not changed his relation to the corporation, and is not entitled to thereafter be regarded as a creditor rather than a stockholder of the corporation: *Hohensell v. Home etc. Assn. (Mo.)*, 41 S. W. Rep. 948; *Rabbitt v. Wilcoxon (Iowa)*, 72 N. W. Rep. 306.

**Assessments.**—If a receiver of a building and loan association is appointed, he may, by proper proceedings, make an assessment upon the stockholders of the amount necessary to discharge the liabilities of the corporation, and thereupon is entitled to maintain an action to enforce such assessment both against borrowing and nonborrowing members: *Eversmann v. Schmitt*, 53 Ohio St. 172; 53 Am. St. Rep. 632.

## STATE v. MAIN.

[69 CONNECTICUT, 123.]

**JURY TRIAL, RIGHT OF JURY TO DETERMINE CONSTITUTIONALITY OF A STATUTE.**—Though a statute declares that the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict, it is not the duty of the jury to consider whether a statute relied upon is constitutional, but, upon that subject, they should follow the instruction of the trial judge.

**JURY TRIAL, INSTRUCTIONS CONCERNING EVIDENCE.** A trial judge can, and, wherever it seems necessary, should, in his charge give his own opinion of the nature, bearing, and force of the evidence adduced, though a statute of the state declares that he shall state to the jury his opinion upon all questions of law arising at the trial and submit to their consideration both the law and the facts, without any direction how to find their verdict.

**JURY TRIAL, DIFFERENCE BETWEEN CIVIL AND CRIMINAL CASES.**—A distinguishing feature of trial by jury in criminal cases, as compared with trial by jury in civil cases, has always been the right of the jury to return a general verdict and such verdict as they may deem proper on the law and evidence without direction from the court. In a criminal case, the court can never assume the right to direct a verdict of guilty.

**JURY TRIAL, RIGHT OF JURY TO DETERMINE THAT A DISEASE IS NOT CONTAGIOUS.**—If the legislature of the state has enacted a statute avowedly for the purpose of suppressing the disease known as "yellows," and the fact that there is such a disease is a matter of common knowledge, of which the court has a right to take judicial notice, a defendant prosecuted for violating such statute has no right to have the jury instructed that if they find that the

"yellows" is not a contagious disease, spreading from one tree to another, and is not a public nuisance, then that the statute is an unwarrantable invasion of the rights and liberty of citizens.

**JUDICIAL NOTICE MAY BE TAKEN** of the fact that a disease exists among trees, known as "the yellows," ordinarily resulting in the premature death of the trees affected.

**CONSTITUTIONAL LAW—DESTRUCTION OF TREES TO PREVENT THE SPREAD OF A DISEASE AMONG OTHERS.**—If a disease exists, commonly known as "the yellows," by which fruit trees are injuriously affected, and if there is a reasonable apprehension that such disease is contagious, a statute authorizing or requiring the destruction of trees affected by such disease is constitutional. The authority to destroy trees so affected may be given to a public officer, to be exercised after due inspection and without any preliminary judicial inquiry and without compensating the owner for any resulting loss.

**JUDICIAL NOTICE TAKES THE PLACE OF PROOF** and is of equal force. In its proper field it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary.

**STATUTE, WHEN NOT VOID FOR UNCERTAINTY.**—A statute authorizing the destruction of fruit trees infected by "the yellows" is not void for indefiniteness or uncertainty, if the court can take judicial notice that the term "yellows" was one the meaning of which was clearly defined by common usage.

**CONSTITUTIONAL LAW.—SUMMARY PROCEEDINGS FOR THE ABATEMENT OF WHATEVER** is dangerous to the public life or safety are often necessary, and have always been permitted when authorized by appropriate legislation. Hence an inspector may be authorized to destroy fruit trees infected by a disease specified in the statute and commonly believed to be contagious.

**JURY TRIAL, RIGHT TO PASS UPON QUESTION WHETHER TREES WERE DISEASED.**—If an owner of fruit trees is subjected to a criminal prosecution on the ground that they had "the yellows," and he had been ordered by the public inspector to destroy them for that reason, such owner is justified in disobeying the order if the trees are not diseased, and is entitled to demand a trial by jury upon that question.

**CONSTITUTIONAL LAW.—WHETHER A FINE IS EXCESSIVE AND UNJUST** is a question of law, and the courts will not adjudge a fine to be so disproportionate to the offense as to come within the constitutional prohibition, unless there is a plain conflict between the supreme law and an enactment of the legislature.

**CONSTITUTIONAL LAW—NUISANCE, STATUTE DECLARING SUPPOSED DISEASE TO BE A.**—A statute declaring fruit trees diseased by "the yellows" to be a public nuisance is not unconstitutional, if the court can say that reasonable apprehensions of danger from the disease were entertained in the public mind, and that it was not impossible that it was dangerous because contagious.

**EVIDENCE TO IMPEACH MINUTES OF A PUBLIC BOARD.**—The records of a public board cannot be collaterally impeached. Hence, if a copy of the records of a state board of agriculture, duly certified by its secretary, is received in evidence, it cannot be met and overcome by oral testimony of such secretary that the statements relied upon in such minutes had been interlined pending the prosecution, and were not any part of the original record.

**THE PRESUMPTION IS THAT EVERY ONE ACTING OFFICIALLY** does his duty.

**PUBLIC OFFICER, EVIDENCE OF, WHEN RECEIVABLE AS AN EXPERT.**—One who is shown to have occupied a public office for a month, and whose duties as such required him to visit and examine fruit trees for the purpose of determining whether they were diseased by "the yellows," is entitled to give evidence as an expert respecting the question whether certain trees examined by him were subject to that disease.

**EXPERT WITNESSES.—THE DECISION OF A TRIAL COURT** admitting a witness to testify as an expert will not be reviewed, unless it is clearly shown to have been based upon incompetent or insufficient evidence.

Donald G. Perkins, for the appellant.

Solomon Lucas, state's attorney, for the appellee.

**127 BALDWIN, J.** Upon the trial of this cause, the defendant claimed that the statute (Pub. Acts 1893, c. 216) upon which the prosecution was based was unconstitutional for various reasons, and asked the court to instruct the jury as follows: "The jury are the judges of the law bearing upon the case as well as the facts, and they are entitled, and it is their duty, to consider the legal questions regarding the constitutionality of the statute in question, and if they conscientiously believe that the statute is unconstitutional upon any of the grounds claimed, then they should acquit the defendant."

The court refused to charge as thus requested, and instructed the jury that the statute (Gen. Stats., sec. 1630) made them the judges of the law, but not in such a sense that they were at liberty to disregard it; that when their judgment was satisfied as to what the law was, that law, as thus ascertained, was binding upon them; that in the opinion of the court, the statute upon which the prosecution was brought was a constitutional and valid law; but that, under the limitations already stated, they were the judges of the law as well as of the facts, and it was for them to say, on all the evidence, and under the law as they should find it to be, and as they conscientiously believed it to be, whether the accused was guilty or not guilty. There is nothing in this part of the charge of which the defendant can complain.

Constitutional law, in the form which it has taken in the United States, is an American graft on English jurisprudence. Its principles and rules are mainly the work of the present century. They rest upon the fundamental conception of a supreme law, expressed in written form, in accordance with which all private rights must be determined, and all public authority administered.

The constitution of Connecticut, article 2, has divided the powers of government into three distinct departments, each



confided to a separate magistracy. To one of these departments is intrusted (Const., art. 5) the judicial power of the state. In all cases where the meaning of a written document is to be <sup>128</sup> collected from the words in which it is expressed, its construction, if called in question in the course of a judicial proceeding, is to be determined by the court. This is a proper and necessary exercise of judicial power. It belongs, therefore, to the magistracy to which the exercise of this power has been confined by the constitution to determine the meaning and effect of the words in which that instrument is expressed.

The defendant contends that, as by General Statutes, section 1630, it is enacted that "the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict," the superior court, in the case at bar, was bound to submit to the determination of the jury the meaning and effect of the constitution, in its bearing upon the validity of the statute under which he was prosecuted. If this contention could be supported it would follow that the general assembly has power indirectly to transgress the constitutional limitations which the people have imposed upon the exercise of legislative power. It is undisputed that that body cannot enact a law which is in conflict with the constitution. But if it can enact that juries, in certain cases, shall decide between the constitution and a statute, when it is claimed by a party to the proceeding that they are in conflict, the legislative magistracy can thus invest the jury with a prerogative which it does not itself possess; and can take that prerogative away from the judicial magistracy, which does possess it, under the tripartite division of the powers of government, upon which our constitution rests.

These questions first claimed the serious attention of the court and bar of the United States in connection with the prosecutions growing out of the sedition law of 1798. By that act of Congress, it was provided that in any prosecution for libel the truth might be given in evidence, and the jury should have "a right to determine the law and the fact, under the direction of the court, as in other cases." Notwithstanding this, the circuit court uniformly held that the jury could <sup>129</sup> not pass upon the constitutionality of the statute: *United States v. Lyon*, Wharton St. Tr. 333, 336; *United States v. Callender*, Wharton St. Tr. 698, 713, 718. In the latter of these cases, Mr. Justice Chase observed in his charge that, by the provision above

quoted, "a right is given to the jury to determine what the law is in the case before them, and not to decide whether a statute of the United States produced to them is a law or not, or whether it is void, under an opinion that it is unconstitutional; that is contrary to the constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law; and whether they amount to the offense described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law. To decide what the law is on the facts is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them. The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the constitution, is prohibited by it expressly, or by necessary implication. Was it ever intended, by the framers of the constitution, or by the people of America, that it should ever be submitted to the examination of a jury to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot<sup>180</sup> possibly believe that Congress intended, by the statute, to grant a right to a petit jury to declare a statute void. . . . I have uniformly delivered the opinion 'that the petit jury have a right to decide the law as well as the fact, in criminal cases'; but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States."

Callender's case was tried in 1800, and the grounds upon which the charge was based, so far as concerns the point now under consideration, have since been repeatedly approved by American courts of last resort: *Commonwealth v. Anthes*, 5



Gray, 185, 191, 192; *Pierce v. State*, 13 N. H. 536, 553, 561; *Franklin v. State*, 12 Md. 236, 245, 246; *Sparf v. United States*, 156 U. S. 51, 71.

General Statutes, section 1630, which first appears in the Revision of 1821, was not intended to narrow the functions of the court, but rather to enlarge them: *State v. Fetterer*, 65 Conn. 287, 291. Trial by jury in criminal cases had, for more than a century before the adoption of our constitution, become something very different in Connecticut from what it was under the common law. The judges, after the first generation of colonists, among whom were some who had been trained for the English bar, had passed away, had seldom received any special legal education. They did not assume to express any opinion of their own to the jury on points of law; contenting themselves with simply recapitulating in the charge the points made by counsel: 2 *Swift's System*, 258, 401. If a verdict of guilty were returned in the county court, the prisoner had, by a statute passed in 1705, an absolute right of "review," that is to a new trial: *Comp. Stats.* 1715, p. 131. As soon as the judicial establishment of the state was reorganized, in 1806, by placing only trained lawyers upon the bench, the judges began the restoration of trial by jury to something like its form at common law: *General Rules of Practice*, 3 Day, 28. The general assembly took action in the same direction in 1812 (*Sess. Laws* 1812, c. 15, p. 106), and in 1818 the framers of the constitution completed the work: *Const.*, art. 1, sec. 21.

<sup>131</sup> Trial by jury had lost, under our colonial government, its native strength and dignity. Legislation and judicial practice had done something toward their restoration. The constitution, in providing that the right of trial by jury should remain inviolate, was designed to perpetuate its essential characteristics, as they existed at common law—preserving its substance, while leaving its form to be regulated from time to time as the legislative power might deem the public interests to require: *Guile v. Brown*, 38 Conn. 237, 243; *State v. Worden*, 46 Conn. 349, 365; 33 *Am. Rep.* 27.

The effect of the statutory provisions in the revision of 1821 by which it was sought to give proper effect to the declaration of rights in this particular, was probably not fully apprehended by those who penned them. Chief Justice Swift, who was one of the revisers, states in his *Digest*, with reference to General Statutes, section 1630, that it precludes the court from expressing any opinion on the facts, or giving any direction to the jury with regard to them, and so that the judge is made a mere cipher,

as it respects the facts in criminal cases, and the jury deprived of that benefit from his ability and experience which in other states, where the common law is recognized, is secured by his explanation and illustration of the testimony, and the statement of his opinion as to its weight and sufficiency: 2 Swift's Digest, 412. The judicial construction of the statute, however, has always been otherwise; and it is settled by a long course of decisions that the judge can, and, wherever it seems necessary, should, in the charge give his own opinion of the nature, bearing, and force of the evidence adduced: *State v. Rome*, 64 Conn. 329, 336. The meaning of a statute must always depend on the words used, and the intention as thus expressed: *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433, 438; *Dartmouth College v. Woodward*, 4 Wheat. 518. Courts cannot, with safety, proceed under any other rule, even if satisfied that this expressed intention was not that which the legislature designed to express, or that understood by contemporary expositors.

It has been assumed in some of the decisions of this court <sup>132</sup> that the statute now under consideration (Gen. Stats., section 1630) may subject to the determination of the jury in criminal cases questions of statutory or common law to a greater extent than would otherwise have been allowed: *State v. Buckley*, 40 Conn. 246, 248; *State v. Thomas*, 47 Conn. 546, 551; 36 Am. Rep. 98. If this be so, it would not follow that it has subjected to their determination any question of constitutional law. It is true that the requests for instructions, which came under review in the cases above cited, related to questions of that nature; but the distinction between constitutional law and other law was not alluded to in argument or considered by the court. We have now found it necessary to consider it fully, and are satisfied that to hold the statute to mean that it is in the rightful province of the jury to determine the true construction of the constitution, in criminal cases, would be to attribute to the general assembly an intent to trench upon the judicial power, and give to verdicts a superior force to that of the words of the constitution itself.

At common law, no jury ever exercised such a function, for there was no written constitution under which the government was created and by which its limitations were established. The constitutional guaranty that the right of trial by jury shall remain inviolate lends therefore no aid to the defendant's position.

On the other hand, the section of the declaration of rights (Const., art. 1, sec. 7, which declares that "in all prosecutions or indictments for libels, the truth may be given in evidence,

and the jury shall have the right to determine the law and the facts, under the direction of the court," implies that, but for such declaration, it would be, to say the least, doubtful whether, in prosecutions for that offense, the jury could, under the principles of the common law, determine the law of the case by their verdict. On that subject, there had been a sharp contest between the English bar and the English bench. In 1792, only twenty-six years before the adoption of our constitution, it had been affirmed by the twelve judges of England, in response to questions put to them by the house of lords, that the general criminal law was also the <sup>133</sup> law of libel, and that in prosecutions for that offense it was the duty of the judge to declare to the jury what the law was, and their duty, should they find a general verdict, to compound it of the fact as it appeared in evidence before them, and of the law as it was declared to them by him: Annual Register 1792, Chron. 62, 68, 69, 75. The same rule was laid down in 1803 by Chief Justice Lewis, in an important prosecution of this nature in New York: *People v. Croswell*, 3 Johns. Cas. 337, 341. The earliest state constitution in which indictments for libel are specifically mentioned is that of Pennsylvania, adopted in 1790, two years before the passage of Fox's libel bill in parliament, in which it was declared that in such proceedings "the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases": 2 Poore's Charters and Const., 1554. Constitutional provisions similarly phrased were adopted by Kentucky in 1792 and 1799, by Tennessee in 1796, and by Illinois in August, 1818: 1 Poore's Charters and Const., 278, 447, 655, 666; 2 Poore's Charters and Const., 1674. The same terms were also introduced, as has been stated, in the sedition act of 1798. In 1817, Mississippi put into her declaration of rights, from which that in our constitution, adopted in September of the following year, was largely copied, a section precisely identical with that now under consideration: 2 Poore's Charters and Const., 1055. It will be remarked that the words "as in other cases" were thus dropped by Mississippi, and, following her lead, by the framers of our constitution. This would seem to indicate that they intended to secure the juries larger power over questions of law in prosecutions of libel than in other criminal trials; and our statute (section 1630) is in entire harmony with this view, since, in lieu of declaring that the jury shall have the right to "determine" the law under the direction of the court in ordinary prosecutions, it only provides that the court shall state its opinion to them



on all questions of law, and then submit the law to their "consideration," without any direction how to find their verdict.

The distinguishing feature of trial by jury in criminal cases, as compared with trial by jury in civil cases, has always <sup>134</sup> been the right of the jury to return a general verdict, and such a verdict as they might deem proper, on the law and the evidence, without dictation from the court. The English judges, from the earliest times, were accustomed to instruct the jury as to the law with the same freedom in criminal as in civil proceedings; but after the decision in *Bushnell's case*, in 1670, they never assumed the right to direct a verdict of guilty.

It was the duty of the superior court to instruct the jury as to the constitutionality or unconstitutionality of the statute under which the defendant was prosecuted; but it would have had no right to direct a verdict either of conviction or acquittal. Their duty to accept the construction of the constitution which the court might adopt was absolute. They were bound to this, as well by their official oath as jurors well and truly to try and true deliverance make between the state of Connecticut and the prisoner at the bar, according to law and the evidence before them, as by the oath which each had taken as a freeman to be true and faithful to the state of Connecticut and the constitution and government thereof: Gen. Stats., sec. 3264. But their right to return such a verdict as they thought proper was absolute also. Law and fact are inseparably blended in every general verdict. By a verdict of not guilty, they might in effect have disregarded the instruction of the court, but only by disregarding the constitution and disobeying the government which they had sworn to support.

The request for instructions, which has been under consideration, was, therefore, properly refused. It is unnecessary to decide whether the instructions which were given in response to it, and substantially followed the charge sustained in *State v. Buckley*, 40 Conn. 246, were in all points correct. They gave the defendant no cause of complaint.

The superior court was also right in refusing to instruct the jury, as requested, that if they should "find that the 'yellows' is not a contagious disease, and the existence of the disease in one tree does not cause it to spread from that tree to other trees, and thus endanger other trees, the property <sup>135</sup> of others, and that a tree so diseased is not a public nuisance, then this statute is an improper and unwarrantable invasion of the rights and property of citizens, the right to care for his property and plant



and cultivate his trees as he desires without interference, and is unconstitutional and void."

Whether the "yellows" was such a disease as to justify the general assembly in enacting the statute under which the prosecution was brought, depended on the existence and nature of the disease, and also on the apprehension of danger from it commonly entertained by the public at large. That such a disease existed, and was one of a serious character, ordinarily resulting in the premature death of the tree affected, is a matter of common knowledge, of which the court had a right to take judicial notice: Century Dictionary, Peach-yellows, and Yellows; Webster's International Dictionary, Yellows. Such a disease it was proper for the general assembly, in the exercise of its police power, to endeavor to suppress, even by the destruction of the trees attacked by it, if there was a reasonable apprehension of substantial danger from allowing them to live, to those who might eat their fruit, or to other peach orchards.

Unless the courts can see that there could by no possibility be such danger, the propriety of such legislation as that now in question is to be determined solely by the discretion of the legislative department. The description of this disease given in standard works and government publications, and the legislation in regard to it to be found in the statute books of Delaware, Maryland, Michigan, New York, Pennsylvania, Virginia, and the Province of Ontario, are amply sufficient to establish as a matter of judicial notice the possibility, if not the probability, that it is a contagious disease: *Grimes v. Eddy*, 126 Mo. 168; 47 Am. St. Rep. 653. The destruction of a tree affected by a disease of that character, without compensation to the owner and against his will, is as fully within the police power of a state as the destruction of a house threatened by a spreading conflagration, or the clothes of a person who has fallen a victim to smallpox. <sup>136</sup> Such property is not taken for public use. It is destroyed because, in the judgment of those to whom the law has confided the power of decision, it is of no use and is a source of public danger.

Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary: *Brown v. Piper*, 91 U. S. 37, 43; *Commonwealth v. Marzynski*, 149 Mass. 68. "The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal

wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or at any rate is so accessible that there is no occasion to use any means to make the court aware of it": Thayer's Cases on Evidence, 20. If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware: *State v. Morris*, 47 Conn. 179, 180.

The defendant, therefore, had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute, by such verdict as they might render under the instructions of the court. It was for the court to take notice that it was a disease which might be contagious: *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 525, 527. This being established, the validity of the statute became a matter of pure law. Police legislation for the extirpation of a disease of such a nature, which the legislative department deems dangerous to the public welfare, cannot be pronounced invalid by the judicial department by reason of any difference of opinion, should one exist, between these two agencies of government, as to the probability of such danger. If the <sup>137</sup> law may be an appropriate means of protecting the public health and the agricultural interests of the state, it is for the legislature alone to determine as to its adoption. It may have been the opinion of the general assembly that peach growers in general would abandon their business, from dread of contagion from orchards infected by the yellows. In such a case, whether their apprehensions were well-founded or ill-founded would be immaterial, unless it also appeared that there could be no reasonable grounds for them. A widespread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action toward the removal of the cause, real or supposed, of the danger apprehended, when this cause is a deadly disease of a food-producing tree: *Bissell v. Davison*, 65 Conn. 183, 191. The destruction of the infected trees by order of a public official, after due inspection, is a remedy which, however severe, is one appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss: *State v. Wordin*, 56 Conn. 216, 226; *Powell v. Pennsylvania*, 127 U. S. 678, 685.

The superior court also properly refused to instruct the jury,

as requested by the defendant, that "if the term 'yellows' in the statute does not define with clearness and certainty a well and commonly known disease of peach trees, capable of being clearly and readily recognized, identified, and shown to exist, but the term is so vague and uncertain that it furnishes no clear and fixed standard so as to determine what said disease is and when it exists, then the statute is void for doubt and uncertainty in defining the disease and the crime of failing to destroy such diseased trees."

As has already been stated, the court had a right to take judicial notice that the term "yellows" was one the meaning of which was clearly defined by common usage. This being so, whether the statute was void for uncertainty, or not, depended simply on the construction of a written document, and was properly and only a question for the court: <sup>138</sup> *Jordan v. Patterson*, 67 Conn. 473, 479; *People v. Smith*, 106 Mich. 431.

The requests for instructions that "the statute is unconstitutional and void because it deprives a person of his rights and property without notice and hearing and without due course of law, without compensation, and violates the right of trial by jury" and that "if the minimum fine provided by the statute is unreasonably great and out of proportion to the act for which it is imposed, considering the nature and circumstances of the act, and such fine would be oppressive and unjust, then it is an excessive fine, and the statute imposing it violates the constitution of this state and is invalid and unconstitutional, and the defendant is entitled to an acquittal even though guilty of the act charged," were also properly refused.

The notice from the deputy commissioner of peach yellows, and the proceedings conducted by him upon the defendant's premises, were sufficient to satisfy every requirement of the constitutions of Connecticut and of the United States, as well as the principles of natural justice, if the trees in question were in fact diseased with the yellows. Summary proceedings for the abatement of whatever is dangerous to the public health or safety are often necessary, and have always been permitted when authorized by appropriate legislation: *Raymond v. Fish*, 51 Conn. 80, 97; 50 Am. Rep. 3. If, indeed, the trees which the defendant was ordered to destroy did not in fact have the yellows, he was justified in disobeying the order. As to this he was entitled to demand a trial by jury; and he has had one, in which the question was properly submitted to their determination: *Miller v. Horton*, 152 Mass. 540; 23 Am. St. Rep. 850; *Health Dept. v. Trinity Church*, 145 N. Y. 32; 45 Am. St. Rep. 579.



Whether the fine prescribed in the statute was excessive presented a question of law, and was properly disposed of as such. It is not so clearly disproportioned to the offense as to come necessarily within the constitutional prohibition, and it is only in case of a plain conflict between the supreme law and an enactment of the legislature, that the courts can <sup>139</sup> interfere for the protection of the citizen: *Blydenburgh v. Miles*, 39 Conn. 484, 497.

The superior court instructed the jury that as the legislature had by this statute declared trees diseased by the yellows to be a public nuisance, that decision was final, and it was not for them to inquire whether they were, in fact, such or not. This position is not without authority for its support: *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 59 Am. Rep. 113. But whether sound or unsound (as to which we express no opinion), the charge in this particular did the defendant no injury, for it was delivered only with reference to the constitutionality of the statute, and as to that the jury had been already definitely and correctly instructed that it was a constitutional and valid law. Its validity did not depend on the question of nuisance, or no nuisance. It was enough that the court could see that reasonable apprehensions of danger from the disease were commonly entertained in the public mind, and that it was not impossible that it was dangerous, because contagious. The court below therefore reached the right result, even if it were by the wrong road.

The defendant requested instructions to the effect that before the commissioner of peach yellows or his deputy "could legally order trees destroyed, regulations in relation to so ordering trees destroyed must have been adopted or approved by the state board of agriculture, and the state having failed to prove any such regulations, the defendant should be acquitted." They were properly refused, because the state had offered evidence tending to show that such regulations had been previously adopted.

This evidence was a copy from the records of the board, duly certified by its secretary, under its seal, purporting to set forth the doings of the board at a meeting held several months before the date of the order served upon the defendant. He sought to meet this document by oral testimony from the secretary that the statement in the minutes of the meeting that certain regulations were adopted had been interlined pending this prosecution, and was no part of the <sup>140</sup> original record. This testimony was properly rejected by the court. It was offered to impeach



the record of a public board, and such a record cannot thus be collaterally attacked: *Gilbert v. New Haven*, 40 Conn. 102.

It is also assigned for error that James P. Brown, a witness for the state, by whom the order in question was made, when asked what position he held at the time it was issued, was allowed to state that he was then acting as a deputy commissioner of peach yellows. If by this he meant to be understood as saying that he acted as such a deputy commissioner in issuing the order, or in inspecting and condemning the trees, the testimony was properly objected to. If, on the other hand, his meaning was that at the time in question he was acting in other matters generally as such a deputy commissioner, the evidence was admissible. But in either case, its reception would be no ground of error, since the copy of record subsequently introduced showed his due appointment to the office in question.

The same witness was allowed to testify that after an examination of the defendant's orchard, he condemned sixty-four trees which were diseased with the peach yellows; the defendant excepting because no facts were stated showing the condition of the trees or symptoms of disease. There was no error in this ruling.

It is a familiar rule of law that every man acting officially shall be presumed to have done his duty, until the contrary appears: *Booth v. Booth*, 7 Conn. 350, 367. This rule rests on the assumption that he will not undertake the execution of his office, unless he is reasonably competent to discharge the duties which belong to it. A man cannot be expected to do his duty who does not know what his duty is, and how to perform it. A commissioner or deputy commissioner of peach yellows is charged by statute with the duty of visiting any peach orchard where it is suspected that there are trees diseased with the yellows; making a personal investigation to determine as to the presence of the disease; and, should he find that any trees are infected by it, ordering their destruction. The witness had for more than a <sup>141</sup> month before his inspection of the defendant's trees been a deputy commissioner of peach yellows under this law. This was, to say the least, a circumstance which the court had a right to consider, in determining whether to receive him on the footing of an expert, even if he were not to be regarded as presumably *peritus virtute officii*: *The Sussex Peerage*, 11 Clark & F. 85, 125, 134; *Dickenson v. Fitchburg*, 13 Gray, 546, 557; *Grayson v. Lynch*, 163 U. S. 468, 480. The record does not disclose whether any further evidence as to his practical acquaintance with the symptoms of the disease was, or was not, in-

troduced. The decision of a trial judge in admitting a witness to testify as an expert will not be reviewed, unless it is clearly shown to have been based on incompetent or insufficient evidence.

There is no error in the judgment appealed from.

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**EVIDENCE—JUDICIAL NOTICE.**—Judicial notice is based upon very obvious reasons of convenience and expediency, and the wisdom of dispensing with proof of matters within the knowledge of everyone has not been questioned: Monographic note to *Lanfear v. Messtier*, 89 Am. Dec. 663, on the subject of judicial notice.

**EVIDENCE—PRESUMPTION THAT OFFICER HAS DONE HIS DUTY.**—If the legality of the acts of a public officer are questioned collaterally, he is presumed to have done his duty: *Hogue v. Corbit*, 156 Ill. 540; 47 Am. St. Rep. 232, and note; *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646, and note.

**POLICE POWER—EXTENT OF—PREVENTION OF DISEASE.**—The power of the legislature to prevent the introduction and spread of infectious or contagious diseases cannot be questioned. All property in the state is held subject to the reasonable supervision of legislative authority, to the extent necessary to the reasonable preservation of the public health: *State v. Speyer*, 69 Vt. 502; 48 Am. St. Rep. 832, and note. A statute which makes horses affected with glanders common nuisances and authorizes their destruction is within the police power of the state: Note to *Miller v. Horton*, 23 Am. St. Rep. 858. But in the exercise of such power the legislature cannot make the decision of an ex parte board conclusive that a horse is diseased, and deprive its owner of the right to be heard, and to have a trial by jury upon the question whether or not it was infected with the disease specified in the statute: *Miller v. Horton*, 152 Mass. 540; 23 Am. St. Rep. 850. Such provision would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law: *Pearson v. Zehr*, 138 Ill. 48; 32 Am. St. Rep. 113, and note.

**STATUTES—CONSTITUTIONALITY OF—WHO JUDGES AS TO.** The judiciary has the power and it is its duty to determine whether a statute conflicts with the constitution, and in case of such conflict to declare the statute void: *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593; *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677; *Rison v. Farr*, 24 Ark. 161; 87 Am. Dec. 52.

**WITNESSES—COMPETENCY AS EXPERTS.**—To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry: *Laing v. United New Jersey R. R. etc. Co.*, 54 N. J. L. 576; 33 Am. St. Rep. 682. See monographic note to *Hammond v. Woodman*, 66 Am. Dec. 228-246, on who are experts and in what cases expert testimony is admissible.

## STATE v. CLARKE.

[69 CONNECTICUT, 371.]

**MUNICIPAL ORDINANCE, WHEN VOID FOR UNCERTAINTY.**—An ordinance declaring it to be a nuisance to erect and maintain any awning except the same be of a suitable form and attached entirely to a building is void for uncertainty in supplying no test by which the average man may, with due care, know whether he is erecting or using his awning in such a manner as not to commit a crime.

Frank D. Haines, for the appellant.

John M. Murdoch, state's attorney, and M. Eugene Culver, for the appellee.

**371** **TORRANCE, J.** The defendant was prosecuted in the city court of Middletown for the violation of an ordinance of that city, and was convicted. He appealed to the superior court and there, upon a trial to the jury, was convicted, and judgment was rendered against him, from which judgment the present appeal is taken.

The complaint charges that the defendant, on the eleventh day of March, 1897, within the limits of the city, "did, and for a long time previous thereto had unlawfully erected and maintained an awning over the sidewalk in front of the premises . . .

**372** occupied by him, which awning is not upon a suitable frame and attached entirely to the building so occupied by him, as aforesaid, . . . against the peace and contrary to the form of the provisions of the ordinance of said city in such case made and provided."

That part of the ordinance upon which this complaint is based reads as follows: "The following acts are declared to be acts of nuisance of the third class: . . . The erection or maintaining any awning, except the same be upon a suitable frame and attached entirely to the building, which awning shall not when extended be less than six feet from the sidewalk."

The facts in the case—and they were really undisputed on the trial—are these: On the date alleged in the complaint, and for a long time prior thereto, the defendant maintained an awning over the sidewalk in front of his store, "which awning rolled up and down upon a wooden frame, which was attached to the building and extended across the sidewalk to wooden posts set near the curbstone, which posts furnished the support for the outer side of the frame." The awning was not permanently attached to this frame, but "was at one end attached to a 2x4 scantling which was nailed to the building, and at the other end was attached to a wooden roller which rolled out upon the frame



above described, when the awning was extended, and which was drawn up to the building by means of ropes, thus rolling up the awning upon it, when the awning was not needed as a shade. . . . No part of the frame, unless the posts aforesaid be considered a part of it, was within six feet of the sidewalk." These posts, "in addition to supporting the frame, were used as hitching posts for horses," and the frame and posts "had existed in the same condition for many years. No evidence was offered by the state to show that the said awning or frame had ever in any way interfered with the health, safety, comfort, or convenience of the public at large, or that the awning or said frame was on the day in question a nuisance in fact or had ever been so." Upon this state of facts the defendant requested the court, among other things, to instruct the jury in <sup>373</sup> substance as follows: 1. That the ordinance in question was invalid and void for uncertainty and ambiguity; 2. That it was invalid and void for uncertainty, "because the word 'suitable' has no definite and determined meaning in the connection in which it is placed, and the defendant could not know that he had done any act which was prohibited by the ordinance"; 3. That the charter gave the city no power to pass this ordinance, and that the ordinance itself was unreasonable, unjust, and oppressive; 4. That the ordinance is invalid "because it attempts to declare that to be a nuisance which is not a nuisance." The court refused to comply with any of these requests. We are of opinion that the court erred in not instructing the jury, as requested, that the ordinance was void for uncertainty. If it be assumed, as claimed by the state, that the city, under its charter, is empowered to pass an ordinance regulating the erection and use of awnings, it may still, perhaps, admit of doubt whether it could by an ordinance declare that to be a nuisance which was not in fact a nuisance; but for the purposes of the argument merely, it will be assumed that the city had power to pass the ordinance now in question, in its present form.

In Webster's International Dictionary the word "awning" is defined as follows: "A rooflike cover, usually of canvas, extended over or before any place as a shelter from the sun, rain, or wind"; and in the Century Dictionary as "a movable rooflike covering of canvas, or other cloth, spread over any place, or in front of a window, door, etc., as a protection from the sun's rays." As thus defined, "awning" means the covering which shelters or protects, as distinct from its frame or support; and this covering may extend over, or hang in front of, the protected place. It is in the sense of the covering, as distinct from its frame, that the word "awn-



ing" is used in this ordinance; for it speaks of the one as distinct from the other. The ordinance does not prohibit all awnings, but only those which do not conform to its requirements. It permits awnings under certain conditions, and, in effect, it punishes as a crime the erection or use of awnings which fail in any way to comply with those conditions. <sup>374</sup> This being so, the conditions ought to be stated with such reasonable certainty that the man of ordinary intelligence may, with reasonable effort, understand them and be able to guide his conduct by them. They should be stated so clearly and unambiguously that the average man may, with due care, know whether in erecting and using his awning he has or has not committed an act which subjects him to fine and imprisonment in a criminal prosecution.

An ordinance of this kind, which limits to a certain extent the use of property, and visits the offender against its provisions with such consequences, ought to be strictly construed; and when thus construed and tested by the rule above stated, we think this ordinance should be held to be invalid. The ordinance in effect prohibits the use and erection of any awning, "except the same be upon a suitable frame and attached entirely to the building, and which awning shall not when extended be less than six feet from the sidewalk." Here are three conditions to be complied with, namely: 1. The awning must "be upon a suitable frame"; 2. Taking the ordinance just as it reads, the "awning" is to be "attached entirely to the building"; 3. The awning "shall not, when extended, be less than six feet from the sidewalk."

Taking these conditions in reverse order, what does the third mean? Does it mean that the awning, or the frame, or both, must be at least six feet above the sidewalk, or six feet laterally from the sidewalk, or both? What is the precise meaning of the second condition? What is it that is to be "attached entirely to the building," the awning, or the frame, or both? What is meant by the phrase "entirely attached"? Does it mean that every part of the awning, or the frame, or both, is to be attached to the building?

To the person who desires to exercise his property rights and have the benefit of an awning, and yet to obey the ordinance, these questions must be quite perplexing; and the ordinance does not clearly and certainly answer them, so as to be a guide to the average man using due care in the premises.

If, however, it can be fairly said with reference to the first <sup>375</sup> two conditions that these doubts and uncertainties are the ordi-

nary ones that arise as to the construction of every law, that they may be obviated by a reasonable construction of it, and that they are not of such a nature as to warrant this court in holding the ordinance to be void on account of them, it is not true as to the first condition. That requires the awning to be "upon a suitable frame," and the ordinance furnishes no criterion by which the question of suitability can possibly be determined. It does not define the word "suitable," as here used, and the law does not define it; indeed, when it is thus used it is incapable of any general or legal definition: *Batters v. Dunning*, 49 Conn. 479; *Smith's Appeal*, 65 Conn. 135. Its use, of necessity, implies the judgment of some tribunal or person who is to determine the question of suitability, and yet neither the charter nor the ordinances of the city empower any person or tribunal to exercise such judgment. This term "suitable," as here used, seems altogether too vague and indefinite to serve as the basis of an ordinance so highly penal in its consequences as this one is. On the whole, we are of opinion that the ordinance in question is void for uncertainty, and that the court below erred in not instructing the jury to that effect.

There is error in the judgment complained of, and it is reversed.

In this opinion the other judges concurred.

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**CRIMINAL LAW—CONSTITUTIONALITY OF.**—An act cannot be made criminal which the party committing cannot know in advance whether it is criminal or not. Hence, the making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect: *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132; 59 Am. St. Rep. 457, and note.

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## McNAMARA v. McDONALD.

[69 CONNECTICUT, 484.]

**GIFT OF A DEPOSIT IN A SAVINGS BANK, WHEN ACCOMPLISHED.**—If a depositor in a savings bank executed and delivered a written order properly addressed to it, and of which it received due notice, for the transfer of the deposit on its books to the plaintiffs, subject to the right of M. to draw from it so much, if any, as should be found necessary for his proper support, and delivered the pass-book to him to be delivered to the plaintiffs at his death, and they accepted the gift, and he drew nothing out for his support, but drew a sum with a view of defrauding plaintiffs and giving it to the defendant, a party to the fraud, who, after the death of M., refused to return the sum so received, the plaintiffs are entitled to recover the amount thereof.

**THE GIFT OF A DEPOSIT IN BANK** is inchoate and revoked by the donor's death, if it was sought to be made by an order directed to the bank to transfer all moneys due the donor to B. M., to be drawn during his life, and after his death to be divided equally among A. B. and C., and the evidence shows that though the order and the bank-book were delivered to B. M., it fails to show that he received them on behalf of the others, or that the bank ever had any notice or knowledge during the life of the donor that the order had been drawn, or that anyone except the donor claimed any interest in the deposit.

**PRACTICE.**—The common counts can be used in Connecticut only as an entire complaint, and cannot follow a special count.

Action to recover money claimed to have been given to the plaintiffs and to have been converted by the defendant to his own use. The complaint was in two counts. The first of these alleged that Ann McDonald, when the owner of a deposit of nine hundred and fifty-four dollars and five cents in the Connecticut Savings Bank, by a written order, duly delivered, directed such bank to transfer the deposit on its books to the plaintiffs, to be equally divided among them, subject to the right of Bryan McDonald to draw so much thereof, if any, as should be necessary for his support; that the bank was notified of the gift, and the deposit-book was delivered to Bryan McDonald to hold during his life and to be delivered to the plaintiffs at his death; that the plaintiffs accepted the gift; that Bryan McDonald became their trustee to hold the book and deliver it to them when the purpose for which he held it had been realized; that afterward the donor died; that during her life no money had been drawn from the deposit, but after her death Bryan McDonald was induced to draw out eight hundred dollars for the purpose of defrauding the plaintiffs, and he turned this sum over to the defendant, who received it with full knowledge of the plaintiff's right, and converted it to his own use. The second count was in the form known as "the common counts," and was for the same sum, and under it a bill of particulars was filed specifying that the defendant was indebted to the plaintiffs for eight hundred dollars drawn from the Connecticut Savings Bank by the defendant through the aid of his brother, Bryan McDonald. A demurrer was sustained to the first count. On the second a trial was had, but the plaintiffs were nonsuited on motion of the defendant.

Charles S. Hamilton, for the appellants.

William B. Stoddard and John C. Clerkin, for the appellee.

488 **BALDWIN, J.** The plaintiffs stated a sufficient cause of action in their first count. According to that, a depositor in a savings bank executed and delivered a written order, properly



addressed to it, and of which it afterward had due notice, for the transfer of the deposit on its books to the plaintiffs, subject to the right of one Bryan McDonald to draw from it so much, if any, as should be found necessary for his proper support; and delivered the deposit-book to him, to be delivered to the plaintiffs at his death; the plaintiffs accepted the gift; he needed nothing and drew nothing for his support during his life, but did draw out eight hundred dollars, in order to defraud the plaintiffs, and gave it to the defendant, a party to the fraud; and after his death the defendant refused to return the money to the plaintiffs on their demand, but has converted it to his own use.

The delivery of such an order, with the deposit-book, to one of the donees, who was to take a beneficial interest for his life, followed by due notice to the bank, upon the acceptance of the gift by the other donees would invest them immediately, and before any actual transfer upon the books of the bank, with the equitable title to the deposit, subject only to such drafts as might be made upon it for the proper support of the party having a life interest. If he fraudulently drew upon it for other purposes, gave the money to a confederate and then died, the latter would be liable to account to the <sup>489</sup> plaintiffs, and guilty of a conversion if he failed to return it to them on demand. The demurrer to this count should therefore have been overruled.

It is also assigned for error that, although several grounds of demurrer were specified, no memorandum was filed by the court stating upon which its decision was based. This omission was in violation of Public Acts of 1895, chapter 155, page 523; but so trivial a defect of procedure, due probably to mere inadvertence, can constitute no cause of appeal: *Atwater v. Morning News Co.*, 67 Conn. 504, 527. Application might have been made to this court, if necessary, to enforce the statutory duty by the issue of appropriate process, in the exercise of its general appellate and superintending powers: *Sikes v. Ranson*, 6 Johns. 279; *Ex parte Crane*, 5 Pet. 189.

The parties went to trial upon a second count, which charged the defendant, Michael McDonald, with having drawn eight hundred dollars of the plaintiffs' money from the same bank, well knowing whose it was, through the aid of Bryan McDonald, who then had in his possession the plaintiff's bank-book. The bank-book and order, which were, at the time of the trial, in the defendant's possession, were produced at the plaintiffs' request, and they laid them in evidence, together with a receipt given to the bank for the eight hundred dollars. The bank-book was the original one, in favor of Ann McDonald, by her maiden

name of McCuen; but over her name the bank had entered "Michael McDonald, executor of Bryan McDonald, administrator." The order read as follows:

"To the Connecticut Savings Bank: Please transfer all the balance due me on Deposit Book No. 28356, being nine hundred dollars, with a year's interest, nearly, to 'Brian McDonald, to be drawn by him during life. After his death the remainder to be divided equally among Susan McNamara, Kate McGuinness, Anna McKeon, Ellen McKeon, and Mary Callan.'

"In the presence of

"William S. Pardee.

<sup>her</sup>  
ANN X McCUEN.  
mark

"New Haven, July 17th, 1894."

490 The receipt was signed by "Bryan McDonald, administrator," and proof was also introduced that he had been appointed, a few months previously, administrator of the estate of Ann McDonald, who was his wife, and had filed a probate certificate of that fact with the bank. Evidence was offered that the order, upon its execution, was delivered, with the bank-book, to Bryan McDonald; but none that he did or said anything indicating that he received them, in any way, in the plaintiffs' behalf, or to show that the bank ever knew that any order had been drawn, or was informed that the plaintiffs had or claimed any interest in the deposit, or to show that Bryan McDonald ever had any communication with them in respect to it.

Under these circumstances, the nonsuit was properly granted. The order not having been delivered to the bank, or brought to its knowledge before Mrs. McDonald's death, was revoked by that event. So far as the evidence disclosed, the bank-book, though delivered to her husband, was not accepted or held by him in behalf of the plaintiffs, nor did they even know that it had been put in his possession. Their claim rested upon an inchoate gift which never became of effect, either in law or equity.

If they had been able to show that Bryan McDonald accepted the bank-book and the accompanying order in their behalf as well as his own, the order, while inoperative, as such, for want of delivery or notice to the bank in her lifetime, might have been effectual to define the terms upon which he received the book, and to constitute a declaration of trust, by virtue of which her administrator might be bound to cause a transfer to be made upon the books of the bank, in conformity with its directions. Even in that case, however, the only trust with which the administrator would have been chargeable in favor of the plaintiffs would have been to cause the transfer to be made on the books of the bank, in the manner indicated by the order, and thus to

clothe himself individually with power to draw out any or all of the deposit at his pleasure, from time to time, during his life, for his own use. Such was the legal effect of the <sup>491</sup> form of transfer directed by Mrs. McDonald. She imposed no limitations whatever on his right to resort to the fund, except that it must be exercised by himself, and would not survive him. The plaintiffs were to be entitled merely to what, if anything, he might choose to leave untouched.

It was not claimed by the appellants in their argument before this court that Mrs. McDonald ever had any other deposit in the Connecticut Savings Bank, or ever gave any other order upon it than that produced upon the trial in the superior court, and as to all the facts relevant to these, they were then fully heard. In view of the evidence on which they relied, it is plain that there could have been no recovery under the first count had the demurrer been overruled. The order did not purport to limit Bryan McDonald's right to draw from the deposit to such amount as might be found necessary for his proper support. Notice to the bank of the gift to the plaintiffs, and of the order by which it was to be accomplished, was never given. Bryan McDonald did not draw the eight hundred dollars in his individual capacity, by virtue of the order but as the administrator of his wife's estate. If it was part of that estate, the plaintiffs had no concern with it; if it has appeared that, in equity, it was not a part, because the legal title was held upon a trust sufficiently constituted and declared, the beneficial title to it, when withdrawn, would have become absolute in Bryan McDonald, for thus the trust would be substantially fulfilled.

The second count, as originally drawn, claimed the full amount left on deposit at the decease of Mrs. McDonald, but the bill of particulars limited the plaintiffs' recovery to the eight hundred dollars which was actually withdrawn. Their rights in remainder were therefore not in issue.

The real case made out by the plaintiffs at the trial was essentially different from the case alleged. A meaning was attributed to a written document which it cannot bear, and a cause of action made out by pleading as facts what had no existence. It may be assumed that the framing of such a fictitious complaint was due to misstatements made to counsel; <sup>492</sup> nor is it necessary to suppose them made with knowledge of their falsity. It is decisive of the case that the complaint was one which could not be supported by proof. The plaintiffs, therefore, were not injuriously affected by the erroneous ruling on the demurrer. The law was against them, and they could not have held a verdict under either count.



To avoid any seeming sanction of the duplication of counts in the complaint, it is proper to observe that the second was made to fulfill an office for which it was not adapted or designed. Under the practice act, the form known as "the common counts" can be used only as an entire complaint for the commencement of an action. It can never follow a special count: Practice Book, rule II, sec. 1, p. 12; *New York Breweries Corp. v. Baker*, 68 Conn. 337, 342.

There is no error.

In this opinion the other judges concurred.

**GIFTS OF DEPOSITS IN BANKS—SUFFICIENCY OF.**—The subject of gifts of deposits in banks is thoroughly discussed in the monographic notes to *Williamson v. Yager*, 34 Am. St. Rep. 189-224; *Sheeuy v. Roach*, 26 Am. Rep. 684-687. See, also, note to *Crook v. First Nat. Bank of Baraboo*, 35 Am. St. Rep. 26, where the previous cases and notes in the series are collected; and note to *Bath Sav. Inst. v. Mathorn*, 51 Am. St. Rep. 389-392.

**PLEADING—COMMON COUNTS.**—The question as to how far the common counts are allowable under the code system of pleading is discussed in the monographic note to *Allen v. Patterson*, 57 Am. Dec. 544-550.

## HOGBEN v. METROPOLITAN LIFE INSURANCE COMPANY.

[69 CONNECTICUT, 503.]

**INSURANCE, LIFE, CONTRACT OF, WHEN INCOMPLETE.**—If an applicant for life insurance, after making his application, changes his mind and refuses to accept the policy when tendered, and neither he nor the beneficiary named therein pays any of the premiums nor authorizes their payment, there is no completed contract of insurance, though another person into whose possession the policy comes pays such premiums.

**INSURANCE, LIFE, PREMIUMS, RIGHT TO RETURN OF THOUGH THE INSURER MAY BE ESTOPPED FROM DENYING THE VALIDITY OF THE POLICY.**—If one having no insurable interest in the life of another pays the premiums on a policy purporting to be issued on the life of the latter, such policy, never having been accepted by the assured, and such payments having been made in the mistaken belief that the policy was valid and might result in benefit to the payer, he may recover of the insurer the premiums so paid, though the latter might have been estopped, had the assured died, from contesting the validity and binding obligation of the policy.

**JURY TRIAL, QUESTIONS WHICH THE COURT MAY DECIDE.**—If a conclusion upon an issue of fact must be drawn from conflicting testimony, it must be submitted to the jury.

Action to recover premiums alleged to have been paid to the defendant insurance company, under a mistake of law and fact, upon a policy signed by the defendant and purporting to insure

the life of Ellen K. Cannon for the benefit of her son John. She applied for the insurance May 8, 1887. The weekly premium was one dollar and twenty cents. On May 30, 1887, a policy was signed by the defendant purporting to be issued in consideration of the payment on or before its date of a premium named and of a weekly premium to be paid on or before each subsequent Monday during the life of the assured. The policy, when tendered to Mrs. Cannon, was not accepted by her, but it soon afterward came to the possession of the plaintiff, who paid the premiums accruing thereon until August 19, 1894. The plaintiff had no insurable interest in the life of the assured, and she alleged that the policy, therefore, never had any legal validity, and that she had been induced to pay the premiums by the false representations of the defendant that she would become entitled to the amount of the policy in case of loss; that she believed these statements, and that she had demanded a return of the premiums and had tendered and offered to surrender the policy. The answer denied the allegations of the complaint except its averring the want of insurable interest of the plaintiff in the life of the assured, and it further averred that the plaintiff, for the purpose of gambling on the life of Mrs. Cannon, fraudulently pretended to have an insurable interest on her life and thereby procured the policy to be issued, and afterward made an agreement with all others interested in the policy, other than the defendant, to be substituted for the beneficiary named in the policy. The court gave the jury certain instructions from which it drew the inference that the plaintiff was not entitled to recover because, conceding her statements to be true, the defendant had become bound by the policy, or, at least, estopped from contesting its validity in the event of the death of Mrs. Cannon. It became apparent, however, that the jurors were unwilling to return a verdict in favor of the defendant, and thereupon they were recalled and instructed peremptorily that the verdict must be for the defendant.

Talcott H. Russell, for the appellant.

Henry Stoddard and Roger S. Baldwin, for the appellee.

**509** HAMERSLEY, J. The undisputed facts do not necessarily establish a valid contract of insurance between the defendant and Ellen K. Cannon. It is not enough for such purpose that the defendant signed a policy of insurance in pursuance of Mrs. Cannon's application, and tendered it to her. The testimony tends to prove, if it does not clearly show, that after signing the application Mrs. Cannon changed her mind; that she re-

fused to accept the policy when tendered, and never received it; that neither she nor the beneficiary named in the policy paid the first premium or any premium, or authorized payment of the same. In such a state of evidence, it would be error in the court to hold that the undisputed facts, viz., the signing of an application, with the execution and tender of the policy, necessarily prove a completed contract of insurance between the defendant and Mrs. Cannon: *Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 97; *Whiting v. Massachusetts Mut. Life Ins. Co.*, 129 Mass. 240; 37 Am. Rep. 317. This question is not definitely passed upon in the charge.

The court, however, couples the facts of the application, the execution of the policy and the tender, with other undisputed facts, viz., that the plaintiff paid the premiums up to the time she attempted to surrender the policy; that two or three years prior to such attempted surrender she wrote the defendant that she held the policy on Mrs. Cannon's life, telling how she claimed to have come by it and offering to surrender it on return of the premiums paid, if the transactions were not straightforward; that the defendant received this letter and thereafter continued to receive premiums from the plaintiff on account of the policy; and thereupon the court tells the jury that "these facts being proved and uncontradicted, the defendant was bound by the policy, and the plaintiff, though she acted in entire good faith in taking the policy and in advancing the premiums, which the defendant denies, cannot recover in this action."

If this statement of the law applicable to the facts recited, 510 is incorrect, it was error for the court, on such ground, to direct the jury to return a verdict for the defendant. It is plainly impossible for the defendant to be bound by a contract which never existed. If Mrs. Cannon had died before the surrender of the policy, it may be that the defendant, through an application of the doctrine of estoppel, might have been compelled to pay the amount of insurance to the plaintiff. But that does not make the contract valid. It does not affect the liability of the defendant to return money paid under an honest mistake induced by its false representations. When the plaintiff discovered her mistake, she returned the policy and demanded the return of the premiums. This she had the right to do, if she had acted in good faith. Her money had been paid in reliance on a valid contract, and not on the chance of an estoppel. She could not be compelled to keep up these payments because the defendant, in the event of the death of the insured, might be estopped from denying the truth of its representations. Nor was the de-



fendant entitled to retain the premiums as compensation for the risk sustained. Whatever the risk may have been, it was not sustained as the result of a contract between the parties, but was incurred wholly through the defendant's own wrong. If, indeed, death had occurred, and the plaintiff had received the amount of insurance, she would then by her own act be estopped from claiming a return of the premium; but she cannot be prevented from reclaiming her money, paid under a mistake, because the defendant, if it had retained the money, might be estopped from taking advantage of its own wrong in causing the mistake. We see no ground on which this part of the charge can be sustained; none was suggested in argument.

We cannot consider whether the evidence on the question really tried to the jury, i. e., the good faith of the plaintiff, is so conclusive that the plaintiff cannot be said to have been injured by the error in the charge. The conclusion is one to be drawn from conflicting testimony, and one of fact, which the jury were not permitted to pass upon. The control a trial court may properly exercise is very large, both before and <sup>511</sup> after a verdict; but questions of fact in issue and material to a judgment, upon which there is evidence sufficient to support a verdict, must be submitted to a jury: *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529, 538; *Cook v. Morris*, 66 Conn. 196, 211.

Upon the testimony reported, the jury might be justified in finding that the payments were in fact and intention made by the plaintiff in the execution of a wagering contract on the life of Mrs. Cannon, which the law holds to be both immoral and illegal. The charge does not state the law applicable to such a state of facts, either in respect to the effect of an honest belief on the part of the plaintiff, induced by the defendant, that the transaction was legal, or as to the position of the payments while held by the defendant pending the termination of the life which is the subject of the wager; in the view taken by the court this was unnecessary. So these questions, while evidently in the case, are not presented by this record.

There is error in the judgment of the superior court, and a new trial is granted.

In this opinion the other judges concurred.

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**INSURANCE—CONTRACT OF—WHEN COMPLETE.**—To establish an executory contract of insurance, it must appear that a contract to insure has been entered into, and everything essential to complete the contract has been done: *Note to Long v. North British etc. Ins. Co.*, 21 Am. St. Rep. 883. But if, at the time of making the contract, it was impossible to obtain important facts affecting the subject of their dealing, the parties may make a general agreement

to accomplish their purpose as well as they can: *Scammell v. China Mut. Fire Ins. Co.*, 164 Mass. 341; 49 Am. St. Rep. 462. Neither the payment of premium nor the reception of the policy by the insured is a prerequisite to a contract of insurance: *Blanchard v. Waite*, 28 Me. 51; 48 Am. Dec. 474. See, however, *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64.

**INSURANCE—RECOVERY OF—PREMIUMS PAID ON VOID POLICY.**—One who, at the suggestion of the insurer's agent and without fraudulent intent on her part, pays premiums on a void policy on the life of her husband may recover such premiums from the insurer: *Fisher v. Metropolitan Life Ins. Co.*, 160 Mass. 386; 39 Am. St. Rep. 495, and note. So an insured person, induced by false representations material to him to take out a policy upon his life, may elect to rescind and avoid the policy, and is then entitled to recover the premiums paid, but if such false representations are not material to him and are a fraud upon the insurer alone, he is not entitled to recover: *Malhoit v. Metropolitan etc. Ins. Co.*, 87 Me. 374; 47 Am. St. Rep. 336.

**TRIAL—FUNCTION OF JURY—CONFLICT OF EVIDENCE.**—Conflict on a question of fact is presented for the jury when the evidence is conflicting or of such character that different conclusions may be reasonably drawn therefrom: *Wadsworth v. Union Pac. Ry. Co.*, 18 Colo. 600; 36 Am. St. Rep. 309. See *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518; 18 Am. St. Rep. 381.

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## **BARTHOLOMEW v. DERBY RUBBER COMPANY.**

[69 CONNECTICUT, 521.]

**CORPORATION, POWER OF TO SELL ITS PROPERTY, AND DISCONTINUE BUSINESS.**—It is competent for any business corporation to sell its property, pay its debts, divide its assets, and wind up its affairs, especially if it is in an embarrassed condition.

**CORPORATION, POWER OF.—THE LEASE OF THE ENTIRE PROPERTY AND BUSINESS OF A CORPORATION** for a term of years made in good faith and without fraud, the lessee agreeing to continue the business which the corporation was organized to carry on, is not ultra vires nor void, if the corporation was in such a condition that the business could not be made profitable under its management for want of capital, nor will such lease be set aside or disregarded at the instance of a minority of the stockholders of the corporation.

**FRAUD MAY, IN SOME CASES, BE INFERRED** from the facts, but not unless it is charged, and then only when the facts and circumstances clearly indicate that fraud has been committed.

Suit by the minority stockholders of a manufacturing company to compel the surrender and cancellation of a lease made by it. This company was a joint stock corporation organized in 1889, to reclaim and work over old rubber and to manufacture and sell rubber goods of all kinds, and, for the purpose of carrying out the objects of the corporation, a valuable plant was procured and business was carried on with profit until June, 1891. At the latter date, a lease of the plant was made to a New York corpora-

tion, which carried on the business until May, 1895, when the lease was canceled by mutual consent. Immediately thereafter the directors of the corporation voted to lease its entire plant to one Lowenthal. The requisite notices were given for a special stockholders' meeting, which was held on the 15th of the same month, for the purpose of confirming the action of the directors. Such meeting was held, at which all the stockholders present, constituting the owners of the majority of the stock, voted to confirm the action of the directors. It appeared by the allegations of the complaint that, when the lease was made, the corporation was not in a condition to carry on its business without additional capital; that the directors and stockholders who were in favor of the lease were unwilling to embark further capital, and no other person offered to furnish it. It was further alleged that the corporation and its directors intended by the action taken to abandon the business created for and during the time mentioned in the lease. This lease was for the term of one year, but gave the lessee a privilege of renewal from year to year for a period not exceeding nine years, and also the privilege, at the expiration of any year, to purchase the property at a price to be determined by appraisal. The prayer of the complaint was that the lease be declared null and void and the lessee required to surrender the property. A demurrer to the complaint was interposed, and, by agreement of the parties, the questions of law arising thereon were reserved for the consideration of the supreme court.

Edwin B. Gager and William S. Downs, for the respondents.

V. Munger, for the petitioners.

527 ANDREWS, C. J. The plaintiffs are a minority of the stockholders of the Derby Rubber Company. They ask that a certain contract called a lease, between the said company and the other defendants, be set aside and declared to be void. The record shows that this contract was made by the directors of the company; that it was, before delivery, submitted to a meeting of the stockholders duly called for that purpose, and that by a unanimous vote of the stockholders present at that meeting and holding a majority of all the stock, it was affirmed and ratified. The plaintiffs, although duly notified of said meeting and the purposes for which it was to be held, voluntarily remained away.

If the contract was really ultra vires of the corporation, the plaintiffs may claim that it should be set aside. The contract contains an option to the lessee to become the purchaser of the property at a price to be fixed by a sort of 528 arbitration. The



complaint avers that it is the intention of the directors and the majority stockholders, in case the option is used, to divide the money received among all the stockholders and wind up the affairs of the corporation. As a conditional contract to sell the property, this agreement is not questioned; nor could it well be questioned. It is competent for any business corporation to sell its property, pay its debts, divide its assets, and wind up its affairs. Especially is this so if the corporation is in an embarrassed condition. It is as a lease for ten years without a sale that the contract is said to be *ultra vires*. We speak of the contract hereafter as a lease. The sole question then is: Was the vote ratifying the lease, and so the lease itself, *ultra vires* and void?

We are inclined to think the lease was not void. The lessee is to continue the same business which the corporation was organized to carry on. The lease, therefore, is not a change in the business, but only a change in the management of the business. The financial condition of the corporation is now depressed, and its business cannot be made profitable under its own management, for want of capital. Additional capital is not available. But neither the directors nor the majority of stockholders have so far lost confidence in the concern as to be willing peremptorily to wind up its affairs. The lease was entered into as the best, perhaps the only, means of carrying the corporation over this period of depression, and in the mean time obtaining some income for the stockholders. If a sale takes place, it is certain that the property will be worth more in operation than if left idle. Such leases have repeatedly been sustained by the courts of equity.

The case of *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. Cas. 318, 326, was like the one in hand, in this: Minority stockholders asked to have a lease of the entire property of the corporation set aside. That company was incorporated for "the working, preparation, and sale of porcelain clay," with power to combine "mining operations" with the original business. After a period of unsuccessful <sup>520</sup> working, a majority of the stockholders voted to and did lease the whole of the works and buildings of the company for the period of twenty-one years. It was held that this was a valid lease, not beyond the power of the company to make. The vice-chancellor, Sir William Page Wood, in giving the opinion, said: "It appears to me that I should be controlling improperly the effect of this deed if I did not allow this company to do that act which, through the medium of their directors they have done. . . . Have the company by this act which they intend to carry into effect . . .

either on the one hand abandoned their purposes, . . . or, on the other hand, exceeded their purposes? Have they done either one or the other? It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property instead of working it themselves, and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition. . . . They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. But, as to that view, I apprehend that it is perfectly competent for a meeting (i. e., of the stockholders) to say: 'China clay is in a very depressed state—the market is very bad—and we agree it is better not to work it for two or three years.' That would be entirely within their functions, and they would not be said, in that respect, to have abandoned their work, or to have exceeded the functions allowed them." The bill was dismissed with costs.

In *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712, 718, a company was established "for the erection, finishing, and maintenance of a hotel, . . . and the doing all such things as are incidental or otherwise conducive to the attainment of" that object. The directors of the company let, for a stipulated period of five years, to the head of a government <sup>530</sup> department for the business of his office, a large part of the hotel. There was evidence that this use would be advantageous to the company in its intended business. This, too, was a bill by minority stockholders asking that the lease might be declared invalid. It was held that the arrangement was valid. In the house of lords, the Lord Chancellor (Lord Campbell), said: "From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India Board, from the monopoly to be enjoyed by the company in supplying so many persons with refreshments; and from the fashionable reputation to be conferred on the hotel by this association, the opinion expressed by the majority of the stockholders, that the arrangement is beneficial to them, is likely to be verified. This anticipation would not be sufficient if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist instead of obstructing the prosecution of

the original undertaking, I must advise your lordships to affirm the decree appealed against."

In *Temple Grove Seminary v. Cramer*, 98 N. Y. 121, a company incorporated as an academy, or seminary of learning, was held not to have exceeded its powers by leasing one of its buildings during the vacations for a boarding-house: See, also, *Lafond v. Deems*, 81 N. Y. 507. In *Brown v. Winnisimmet Co.*, 11 Allen, 326, a company chartered as a ferry company let one of its vessels not needed in its ferry business to be used in another business. This was held not to be an ultra vires contract: See also, *City Hotel v. Dickinson*, 6 Gray, 586; *French v. Quincy*, 3 Allen, 9; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Calloway Min. etc. Co. v. Clark*, 32 Mo. 305; *Watts' Appeal*, 78 Pa. St. 370; *Dupee v. Boston Water Power Co.*, 114 Mass. 37.

We have considered this case on the assumption that the action of the directors and the majority stockholders was done in good faith and in the honest belief that they served the best interests of all concerned. If fraud had been charged <sup>531</sup> a very different case would have been presented. Counsel for the plaintiffs says in his brief that the lease was fraudulent on its face. But fraud is not charged in the complaint. Fraud is never to be presumed. While fraud may in some cases be inferred from the facts, it is never to be inferred unless it is charged, and then only where the facts and circumstances indicate clearly that fraud has been committed.

The superior court is advised that the complaint is insufficient, and to sustain the demurrer.

In this opinion the other judges concurred.

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**CORPORATIONS—POWER TO DISPOSE OF PROPERTY.**—A private corporation may dispose of its property without express statutory authority: *Benbow v. Cook*, 115 N. C. 324; 44 Am. St. Rep. 454; *Warfield v. Marshall Co. etc. Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263, and note. See *Holmes etc. Mfg. Co. v. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, and note. But the insolvency of the corporation may make such a transfer void as in fraud of creditors: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78.

**FRAUD—FACTS CONSTITUTING MUST BE PLEADED.**—To avoid a judgment on the ground that it was obtained by fraud, the facts constituting the fraud must be pleaded and proven: *Thomas v. Thomas*, 33 Neb. 373; 29 Am. St. Rep. 483, and note. The facts constituting fraud must be clearly stated, whether it is alleged in a petition as a cause of action or in an answer as a ground of defense: *Nichols v. Stevens*, 123 Mo. 96; 45 Am. St. Rep. 514. See *Bank of Little Rock v. Frank*, 63 Ark. 16; 58 Am. St. Rep. 65.



**MCGORTY v. SOUTHERN ETC. TELEPHONE COMPANY.**

[69 CONNECTICUT, 635.]

**MASTER AND SERVANT, NEGLIGENCE, WHEN SERVANT MUST SHOW THAT IT WAS NOT HIS OWN NEGLIGENCE FROM WHICH HE SUFFERED.**—If a plaintiff sues to recover for injuries sustained by him from the rotten condition of a telegraph pole, and the work in which he was engaged was such that from its nature, and the terms of his contract, and from other facts and circumstances, it must have been the duty either of himself or of his employer to have made the inspection necessary to determine the condition of the pole, he must set forth in his complaint the facts showing whether this duty devolved on his employer, and whether the exercise of due care did not require the employé to examine the pole in question.

**NEGLECT OF LINEMAN IN CLIMBING POLE WITHOUT FIRST TESTING IT.**—If it was a rule that a lineman should look out for his own safety in climbing poles and should inspect and test poles for himself and judge of their safety, suitable appliances being at hand for such testing, an experienced lineman must be presumed to have known of this custom, and if he climbs a pole when ordered without such test and is injured through its rotten condition, the accident must be regarded as due to his own fault or negligence.

**MASTER AND SERVANT, ASSUMPTION OF RISKS.**—The linemen of telephone and telegraph companies have no right to rely upon the soundness and safety of poles upon which they are to work. Employers have a right to decide how their work shall be performed, and may employ men to work in an unsafe place or with dangerous implements without incurring liability for injuries sustained by workmen who knew, or should have known, of the hazards of the service they have chosen to enter.

**MASTER AND SERVANT, DUTY OF MASTER TO SERVANT, WHEN A QUESTION FOR THE JURY.**—Whether it is incumbent upon a master or a servant to perform the duty of seeing that the appliances upon or with which he is to work are in a safe condition is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and other circumstances.

Action to recover injuries claimed to have been caused the plaintiff by the negligence of the defendant. The plaintiff was an experienced lineman who had worked in that capacity fourteen years. While employed by the defendant, he was called upon to climb a pole which appeared to be in good condition. Upon asking the foreman whether all the poles were all right, the latter replied, "Yes, we have been up there and taken off old wire a hundred times." The same pole had been climbed by the plaintiff about an hour prior to the accident. It, however, gave way and fell to the ground, causing the plaintiff serious injury, and this giving away was caused by the pole being rotted through a few inches below the surface of the ground. It appeared that the duties of linemen were to climb poles and work at poles and cross-arms near the top of telegraph and telephone poles; that in

this work usually about six men were employed, among whom was a foreman who was himself a lineman. Each was equipped with apparatus for climbing poles. There were several methods of testing poles for the purpose of determining whether they had strength sufficient to bear climbers. The ordinary continuance of durability of a pole was from three to seventeen years. The one causing this accident had been in use eleven years. The defendant supplied necessary tools for testing poles, and each lineman was expected to look out for his own safety and judge whether a pole should be tested, and, if so, to ascertain the mode in which the test should be applied. The trial court found that the accident was the result of the plaintiff's negligence, and hence that he could not recover.

James E. Walsh and Henry A. Purdy, for the appellant.

John W. Alling and James T. Moran, for the appellee.

**639** HALL, J. The substance of the plaintiff's reasons of appeal is, that the court erred in deciding, upon the facts found, that the defendant was not guilty of negligence, and that the plaintiff was entitled to recover only nominal damages. In support of this claim he cites *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 469, 47 Am. Rep. 653, *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, and other authorities, which lay down the general rule of law that it is the duty of employers to use ordinary care to provide for their employes safe places in which to work and safe appliances with which to perform their work. An examination of the record shows that the principle stated in these cases cannot avail the plaintiff in this action.

The particular acts which it is said the defendant negligently failed to perform, in order to render the place where the plaintiff was working reasonably safe, were the testing of the poles which were being removed, and the supporting of those which were found to be insecure, before the linemen **640** were ordered to work upon them. The complaint avers that it was the duty of the defendant to so inspect and support the poles, and set forth, as the facts upon which such duty is predicated, that "it was a rule and custom of said defendant company that whenever an old line of poles was being supplanted by new poles, to have said old poles tested at their base for the purpose of ascertaining whether or not they were rotted and unsafe or dangerous in any way for a lineman to climb . . . for the purpose of removing cross-arms or wires from the same; and, in case any of said poles were found to be rotted at the base, to guy the same with wires or ropes to prevent them from falling while the linemen were at

work upon the same; that said rule and custom was known to the plaintiff, and he supposed and believed that said pole had been properly tested by the defendant company before ordering him to climb the same, . . . and that plaintiff had no knowledge that said pole was rotted and defective at its base; that the defendant wholly failed to test said pole as had been its custom and rule prior to that time; . . . that said pole was not guyed by wires or ropes in any way, . . . and that the defendant knew, or by the exercise of due care could have known, that said pole was rotted at its base, and that the same was incapable of sustaining any weight upon it."

There are no facts stated in the complaint which indicate that any special mechanical skill was required to discover the defect in the pole, or that the linemen, of whom the plaintiff was one, were not competent persons to inspect and test the poles; or that any of the officers or other employes of the defendant possessed superior qualifications or had better means or opportunities than the plaintiff to ascertain whether the condition of the old poles was such as to render it safe for the workmen to climb them.

The plaintiff made no examination of the base of the pole which fell. He knew that it was not guyed or supported in any manner. He says that by the exercise of ordinary care its decayed condition could have been detected, but that from his knowledge of the rule and custom of the defendant to inspect and secure the old poles before linemen were sent to <sup>641</sup> work upon them, he believed that this pole had been properly tested and found to be safe, and for that reason made no examination himself. The complaint makes these facts the basis of the defendant's alleged liability.

As the testing and supporting of the old poles, from the nature of the work, might, either by the terms of the contract of employment or from other facts and circumstances, have been either a duty of the employer or one of the duties of the plaintiff, and as the plaintiff could not in an action at law recover compensation for an injury resulting from his own negligent failure to perform a duty which he was employed to perform, it was essential to the plaintiff's case that he should set forth in his complaint the facts showing why this duty devolved upon the defendant, and why the exercise of due care did not require the plaintiff to examine the pole in question.

Whether in this case the plaintiff's injury resulted from his own or from the defendant's negligence depended, therefore, upon the truth or falsity of these averments; and the determina-



tion of the question of whether it was the rule and custom of the defendant, as alleged, to inspect and secure the old poles before they were climbed by the linemen, or whether it was one of the duties of the linemen to themselves test the poles and, if found unsafe, to secure them, became decisive of the plaintiff's alleged right to rely upon his belief that the poles had been tested by the defendant and found to be safe.

These allegations of fact, upon which the averments of duty and of negligence upon the part of the defendant depend, were contested upon the hearing, and having been decided, as appears by the finding, adversely to the plaintiff, the question of negligence has thus been determined as a question of fact.

The trial court has found that it was not the rule and custom of the defendant to inspect and test the poles, but that it was the rule and custom, in this branch of the work, that "each lineman should look out for his own safety in climbing poles"; that each lineman should inspect and test the poles for himself and judge of their safety, and that suitable appliances <sup>642</sup> were at hand for testing and securing poles. That the plaintiff knew this rule, and understood that testing and inspecting were a part of his duties, must be presumed from the fact that he was a lineman of fourteen years' experience, and in that capacity had formerly been in the employ of the defendant.

The finding of the trial court is thus conclusive upon the question of negligence. It shows that the plaintiff, with a knowledge, when he was ordered to climb the pole in question, that it was the duty of no one but himself to decide whether it was safe, and that if he doubted its safety that he was at liberty to support it by appliances furnished by the defendant for that purpose, chose rather to rely upon the safe appearance of the pole and the assurances of his fellow-workmen, and to take the risk of the pole being sound, without making a proper examination himself. If the accident occurred from the negligence of any person, it was through the plaintiff's own fault. He was the person employed by the defendant to examine the poles and see that they were safe to work upon. As he was able to perform both the work of inspecting and climbing, the defendant ought not to be required to employ some other person than the linemen to test the poles.

We have no occasion, upon the facts found, to consider whether the foreman Phelps was a fellow-servant of the plaintiff, a question discussed in the briefs of counsel. The accident did not occur from the negligence of Phelps. It is true he directed the plaintiff to climb the pole, and, in answer to the latter's inquiry,

truthfully said, as might any other lineman who had tested the pole for himself, that he had been up the pole, and expressed his opinion that it was safe. But the plaintiff knew that it was not a part of the duty of the foreman to instruct an experienced lineman as to the safety of a pole he was about to climb; and, from the facts found, we must assume that although he knew that, in obedience to the order of the foreman, he was required to do the work upon the pole, yet he was to rely upon his own judgment in determining whether it was safe to climb it without testing it or <sup>643</sup> supporting it, and that it was his right to secure the pole before climbing it if he doubted its safety.

It cannot be laid down as a proposition of law, as seems to be claimed by plaintiff's counsel, that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements, and in unsafe places, without incurring liability for injuries sustained by workmen who knew or ought to have known the hazards of the service which they have chosen to enter: *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Dixon v. Western Union Tel. Co.*, 68 Fed. Rep. 630; *Greene v. Western Union Tel. Co.*, 72 Fed. Rep. 250; *Flood v. Western Union Tel. Co.*, 131 N. Y. 603; *Cumberland Teleph. Co. v. Loomis*, 87 Tenn. 504.

In the last-named case, which was an action for damages for an injury sustained by the fall of a telephone pole, the trial court charged the jury that the "plaintiff [defendant in error] had a right to assume that the pole upon which he was ordered to work in cutting away the dead wire was safe and suitable, and of sufficient strength to support the wires and cable suspended thereon, together with his weight, and it was not Loomis' duty, when sent to cut away dead wires, to inspect the pole." Upon an appeal from a judgment in favor of Loomis, Judge Snodgrass, in giving the opinion of the supreme court with reference to the portion of the charge above quoted, said: "The objection to this is twofold: 1. That it assumes as a matter of fact, and so de-

cides, that Loomis <sup>644</sup> was not the employé who should have served as 'inspector' for the company, which was a disputed question of fact."

From the facts in the case at bar, we are of opinion that the falling of the pole in question was one of the hazards assumed by the plaintiff by his contract of employment, and that the superior court committed no error in holding that the defendant was not guilty of negligence, and that the plaintiff was entitled to recover nominal damages only.

There is no error.

In this opinion the other judges concurred.

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**MASTER AND SERVANT—INJURY TO SERVANT THROUGH DEFECTIVE APPLIANCES—PLEADING.**—To enable an employé to recover from his employer on account of injuries received by reason of defective places, machinery, appliances, or incompetent co-employés, it is generally necessary to allege and prove that the employer was in fault, and that the employé was without fault, or to allege and prove facts from which such fault or want of fault may be inferred: *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251, and note. See, also, *Union Stockyards Co. v. Conoyer*, 38 Neb. 488; 41 Am. St. Rep. 738, and note.

**MASTER AND SERVANT—ASSUMPTION OF RISKS.**—Every servant assumes the obvious risks of the service into which he enters, however dangerous the business may be, and though it may easily be conducted more safely by the employer: *Fitzgerald v. Connecticut etc. Paper Co.*, 155 Mass. 155; 31 Am. St. Rep. 537, and note. If defects complained of are as open and obvious to the servant as they are to the master, the servant cannot recover for an injury arising therefrom: *Louisville etc. R. R. Co. v. Stutts*, 105 Ala. 368; 53 Am. St. Rep. 127, and note.

**MASTER AND SERVANT—INJURY TO SERVANT.**—The question as to whether an injury to a servant through defective appliances is owing to the negligence of the master or to that of the servant is ordinarily one of fact for the jury: *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Colorado etc. Co. v. Lubbers*, 11 Colo. 505; 7 Am. St. Rep. 255; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745; *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**ILLINOIS CENTRAL RAILROAD COMPANY v. O'KEEFE.**

[168 ILLINOIS, 115.]

**CARRIERS—ACTION FOR WRONGFUL DEATH OF PASSENGER.**—There can be no recovery against a railroad company for the negligent killing of a person, alleged to have been a passenger upon the defendant's train, without proof that he was a passenger, and that he was exercising ordinary care and prudence for his safety when killed.

**CARRIERS—ONE BECOMES A PASSENGER, WHEN.**—One does not become a passenger until he has put himself in charge of the carrier for transportation, and has been expressly or impliedly received as a passenger by the carrier.

**CARRIERS—STATUS OF PASSENGER IS NOT CREATED BY PASS OR TICKET.**—The fact that one holds a free pass over a route, or has purchased a ticket, does not make one a passenger unless he comes under the charge of the carrier, and is accepted for carriage by virtue of it.

**CARRIERS—BECOMING A PASSENGER—BOARDING A MOVING TRAIN.**—The act of boarding a moving railroad train, after it has left the station, without the invitation or consent of any authorized agent of the railroad company, does not make one a passenger, although he intended to become one by his act, and held a free pass over the company's line.

**CARRIERS—BECOMING A PASSENGER—KNOWLEDGE OR CONSENT OF CARRIER'S AGENTS.**—If a person boards a moving railroad train between the engine and the baggage-car, and is, within a few minutes afterward, negligently killed in a collision, the fact that the engineer and conductor knew that he boarded the train, but did not know who he was, or for what purpose he was there, does not tend to show that the company accepted him as a passenger.

**CARRIERS—WHO IS NOT A PASSENGER—QUESTION OF LAW.**—In an action against a railroad company for negligently killing one alleged to have been a passenger on a train, it is proper to instruct the jury to find the defendant not guilty, if there is no evidence to establish the fact that the deceased was a passenger on the defendant's train.

Action by Margaret O'Keefe, administratrix, to recover damages for the negligent killing of her husband, who was alleged to have been a passenger on the defendant's train. The facts are sufficiently stated in the opinion, and in the note of the dissenting opinion, *infra*. The plaintiff obtained a verdict in the circuit court, and the judgment thereon was affirmed by the appellate court. The defendant appealed.

William H. Green and James Fentress, for the appellant.

William A. Schwartz and Karraker & Lingle, for the appellee.

**118** CARTWRIGHT, J. This case was before this court on a former appeal, and the judgment appealed from was reversed: *Illinois Cent. R. R. Co. v. O'Keefe*, 154 Ill. 508. The case has been again tried, resulting in a verdict and judgment for three thousand dollars, and the appellate court has affirmed that judgment.

The facts will be found stated in the former report of the case, and will not be repeated in full in this opinion. The ground upon which defendant was charged at the trial with liability for the death of O'Keefe was, that he became a passenger on defendant's train from Anna to Carbondale, and was killed through the negligence of defendant in the collision with the other train. At the close of the evidence the defendant asked the court to instruct the jury that such evidence was not sufficient to authorize a verdict for the plaintiff, and that they should find the defendant not guilty. The instruction was refused and the defendant excepted. The contention here is, that the instruction should have been given because the evidence did not fairly and legally tend to prove that **119** deceased was a passenger or that he was exercising ordinary care and prudence when killed, while it was necessary for the plaintiff to establish both these propositions by some affirmative evidence in order to recover.

Considering the latter of these propositions first, a reference to the opinion of the court upon the former appeal shows that the judgment was reversed for error of the court in instructing the jury, as matter of law, that it was not negligence, of itself, for O'Keefe to ride on the steps or platform of the car. It was further said that an assumption of negligence on the part of the defendant, or that the deceased was not negligent, could not be stated, under the facts of the case, as a matter of law. The evidence did not greatly differ in the two trials, and we adhere to the previous holding that on the question of negligence the case might properly have been submitted to the jury.

It was also necessary for the plaintiff to prove that the rela-

tion of passenger and carrier existed between the deceased and the defendant. This relation which was claimed to exist is a contract relation. A railroad company holds itself out as ready to receive and carry, and is bound to receive and carry, all passengers who offer themselves as such at the places provided for taking passage on its trains, and who take such passage in the cars provided for passengers. When one so presents himself, the contract relation under which he acquires the rights of a passenger may be either express or may be implied from the circumstances. If a person goes upon cars provided by the railroad company for the transportation of passengers, with the purpose of carriage as a passenger, with the consent, express or implied, of the railroad company, he is presumptively a passenger: *Elliott on Railroads*, sec. 1578. Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company to be transported, and the company does it by expressly or <sup>120</sup> impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585; *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298; *Elliott on Railroads*, sec. 1581. Deceased was the holder of a free pass on the road, but that fact alone would not create the relation of passenger and carrier. The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier and is accepted for carriage by virtue of it. If a ticket holder should offer himself as a passenger, and should be refused transportation, there would be a liability for consequent damages, but it would not be a liability to him as a passenger or on account of the relation of passenger and carrier, but would be a liability for the refusal to enter into that relation and to permit him to become a passenger.

The uncontroverted evidence bearing upon the question whether O'Keefe became a passenger was as follows: He lived about three hundred yards north and fifty yards east of defendant's station at Anna. The limited vestibule train on defendant's road came from the south, and stopped at the station while he was sitting at the table at home, eating breakfast. The train consisted of a baggage-car, two coaches, and a sleeping-car. It was a solid vestibule train, the vestibules filling the spaces between the cars, with a door at each entrance and exit to and from the



platforms of the passenger coaches. These doors are opened at the stations to discharge passengers who have reached their destination and to receive those desiring to become passengers, and these are the places where passengers present themselves to take passage. While this train was at the station at Anna it was prepared for the reception of passengers who desired to be <sup>121</sup> transported to other stations, by opening the doors, and passengers for Anna were discharged at the station. When the doors are closed, a person on the outside cannot get in, and when the business at that station had been done the doors designed for the admission of passengers were closed, and the train left the station as a solid train, closed and inaccessible up to the platform next the tender, in front of the baggage-car. When the train was moving from the station, O'Keefe took his hat and ran out of the door, and ran to the railroad track and south toward the approaching train. When he met the train it was going three or four miles an hour, and he climbed on the platform next the tender, at the front end of the baggage-car. As he passed his house his wife saw him standing on the platform with his back against the baggage-car door. The engineer and conductor saw him climb on the platform, but did not see him afterward, and the conductor did not know who he was. He was not seen after his wife saw him until he was found dead, sitting on the step of the platform, holding the guardrail with one hand. When found he had a piece of paper in one hand and a pencil was lying on the ground. After leaving Anna, the conductor went through the train, commencing at the north end of the first passenger coach next the baggage-car and going the entire length of the train. He then came back, unlocked the door to the baggage-car, and went in, as he said, to see about the person who got on the platform, and, seeing the other train approaching, he and the baggageman jumped off through the side door.

The question is, whether these facts fairly tend to establish the relation of passenger and carrier between O'Keefe and the defendant, by showing that he had put himself in the care of the defendant as a passenger, and had been expressly or impliedly received and accepted as such by the defendant through any authorized agent. We think that they do not. He did not go upon the train at <sup>122</sup> the station provided for the reception of passengers, and did not take any place provided for the reception, accommodation, or carriage of passengers. He did not comply with any of the ordinary customs under which defendant held itself out as ready to receive and carry passengers or under which they are received or carried. It is said that he no doubt tried to open the baggage-car door, and the inference in-

tended is, that he tried to put himself in charge of defendant as a passenger, in a proper place. There is no evidence of the supposed fact, and, if there were, it could make no difference. It will certainly not be claimed that defendant was bound to have the baggage-car door open so as to give access to its passenger coaches by way of the baggage-car. But, even if that were a wrong to him, he could not become a passenger by attempting to get in that door any more than if he had attempted to open one of the vestibule doors which was locked, and had failed. He had not put himself in the care of the defendant as a passenger. Of course, the fact that the engineer knew that deceased climbed upon the train would not make him a passenger, since an engineer is not authorized to act for the defendant in such a matter or to accept passengers. Nor do we think that the mere fact of the conductor knowing that some one had boarded the moving train on the platform between the tender and baggage-car, and might still be there, is evidence tending to show that defendant accepted him as a passenger. The conductor did not know who he was or what he was there for—whether as a passenger or otherwise. As conductor he performed the usual duties after leaving the station, and had not reached this platform next the tender when the accident occurred. He had done nothing in the matter one way or the other. The train was moving slowly when O'Keefe climbed on. But that fact is only material on the question of negligence on his part in boarding a moving train. The train had left the station, and there would be no difference, so <sup>123</sup> far as creating a relation of passenger and carrier was concerned, whether he got on there or at some other place between stations where the train was moving slowly. Of course, he might have ridden on the platform in safety but for the collision, and so also he might on the engine or tender, or elsewhere on the train where passengers are not carried. That fact concerns only the question of negligence, and is not material on the question whether he became a passenger.

As we have concluded that there was no evidence tending to establish one necessary element for a recovery—that the deceased was a passenger on defendant's train—it follows that for such failure of proof the instruction asked should have been given.

The judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court.

CARTER, J., DISSENTED. He said: "I do not concur in the decision rendered by this court in this case. It is held, as it was held when this cause was before us at a former term (Illinois Cent. R. R. Co. v. O'Keefe, 154 Ill. 508), that it was a question for the jury to

determine whether the deceased was himself guilty of negligence or not, and the judgment below is not reversed for lack of evidence showing due care on his part for his own safety. So far, I am satisfied with the decision, but I dissent from the conclusion reached that there was not sufficient evidence to go to the jury tending to prove that the deceased was a passenger on appellant's train when he was killed. It is established that the collision of the two trains which caused O'Keefe's death was caused by the negligence of appellant. This question is not controverted, but this, the second, judgment for appellee is reversed on the sole ground that, considered as a question of law, not of fact, O'Keefe was not a passenger at the time of the accident. It seems clear to me that if he was not a passenger he was a trespasser. If not, what was his relation to the company? Now, if he was a trespasser he was guilty of negligence in getting upon the train under the circumstances shown by the evidence and riding on the platform as he did. But it has been twice held in this case that that was a question of fact upon which this court cannot set aside the finding of the jury. So, also, in my opinion, is the judgment below conclusive upon the question whether he was a passenger or not. That is equally a question of fact, under the evidence. When the jury found that O'Keefe was not a trespasser and was in the exercise of due care for his own safety, and when this court confirms that finding, it logically follows, as it appears to me, that he was rightfully on the train as a passenger, for there was no pretense that he was there in any other capacity.

"The evidence shows that O'Keefe had a contract with appellant to deliver to it a large number of railroad ties, and in connection with this contract had received from the company a pass over its road to enable him to travel to and from different points in carrying out the terms of the contract. He had occasion frequently to pass over appellant's road, using this pass, and sometimes, with knowledge of the trainmen, riding in the baggage-car. For purposes connected with his contract relating to the delivery of ties, it became important on the morning in question that he should take the train upon which he afterward met with the accident, at Anna, for another station on the road. Failing to get to the depot in time to take the train, he was compelled, to avoid being left, to climb onto the forward platform of the baggage-car while the train was passing him and was moving at the rate of three or four miles an hour, the train being a fast one and the passenger coaches vestibuled. The engineer and conductor saw him get upon the train, but the conductor testified that he did not know at the time that it was O'Keefe, but he did not do anything to indicate that he objected to the carrying of O'Keefe in the manner now complained of. About fifteen minutes after the train had left Anna the collision occurred in which he was killed. The deceased was found sitting upon the steps, crushed between the forward end of the baggage-car and the tender. Whether, after getting upon the train, he could have passed through the door at that end of the baggage-car, and by that means have proceeded to the passenger coaches was a controverted question under the evidence. It is apparent that O'Keefe entered upon the train for the purpose of taking passage and



of becoming a passenger. He was not injured in the act of boarding the train, so that it was immaterial whether he got upon the train at the station, or afterward, when it was in motion, unless it could be considered as affecting the question whether, by getting upon the train where he did, he became a passenger or not, and that would be a question of fact, settled in the appellate court. The jury were authorized, from the evidence, to find that he did all he could, under the circumstances, to become such passenger; that he had the right of passage on the train; that he was upon the train with the implied consent of appellant, and that while on such train, and before he could enter a passenger coach provided for the carriage of passengers, he was killed through the negligence of appellant. If they so found, then I think it follows that they must have found that he was a passenger. The jury had the right to find, from all the circumstances, including the fact that, after the conductor saw him get on the front end of the baggage-car, he went from the other end of that car through the train taking the fares of passengers without saying anything to O'Keefe and without interfering with him in any way, that he did not object to his riding in that way; that is, to find implied consent on the part of the company.

"In *Thompson on Carriers*, 42, 43, it is said: 'The whole matter seems to depend largely upon the intention of the person at the time he enters the boat or cars,' etc: See, also, *North Chicago Street R. R. Co. v. Williams*, 140 Ill. 275; *Chicago etc. R. R. Co. v. Mehlsack*, 131 Ill. 61; 19 Am. St. Rep. 17. It is said by Elliott in his late work on *Railroads*, volume 4, section 1578: 'We think it is safe to say that the general rule is, that everyone on the passenger trains of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger.'

"It is, I think, clear from the authorities that it was a question of fact whether or not the deceased was a passenger at the time he was killed, and that this question does not come within the rule laid down by this court in *Simmons v. Chicago etc. R. R. Co.*, 110 Ill. 340, and other cases, that 'when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.'

"By the verdicts of two juries, followed by two judgments of the trial court and two judgments of affirmance by the appellate court, it has been determined as a question of fact, from the evidence, that the relation of carrier and passenger existed between the appellant and the plaintiff's intestate. The first judgment was reversed by this court without any intimation that, upon the record (substantially the same as the one now before us), the plaintiff had no case, and the cause was sent back for another trial. For what purpose? Simply for the plaintiff to be told, after such trial and another weary journey to this court, that she never had any case to be submitted to a jury."

**Passengers, Who Are, and When They Become Such.\***

*Definitions—Commencement of Relation.*—A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent thereof: *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256, 267; *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585; note to *Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 293. It is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting-room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *Commonwealth v. Boston etc. R. R.*, 129 Mass. 500; 37 Am. Rep. 382. The relation of passenger and carrier is clear where a person has secured a ticket and put himself in the charge of a carrier's employes to be transported from place to place: *Choate v. Missouri Pac. Ry. Co.*, 67 Mo. App. 105; but to constitute one a passenger on a railroad train, it is necessary that he should be rightfully on the train, or be thereon with the knowledge or consent of the carrier, or its agent in charge of the train: *Woolsey v. Chicago etc. R. R. Co.*, 39 Neb. 798.

A passenger is a person whom a common carrier has contracted to carry from one place to another, and has in the course of the performance of that contract received under his care either upon the means of conveyance or at the point of departure of that means of conveyance: *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444. A contract of carriage by a common carrier begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with a purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket, and the relation, once constituted, continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises, or has been allowed a reasonable time to leave such premises: *Hansley v. Jamesville etc. R. R. Co.*, 115 N. C. 602; 44 Am. St. Rep. 474. The relation begins when one puts himself in the charge or control of the carrier, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier: *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298; *Gardner v. New Haven etc. Co.*, 51 Conn. 143; 50 Am. Rep. 12. No person becomes a passenger except by the consent, express or implied, of the carrier: *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65; 35 Am. Rep. 299. One's right to care and protection as a passenger begins after he has made a contract for passage upon the means of transportation, and has pre-

## \*REFERENCES TO MONOGRAPHIC NOTES.

Exemption of passenger carrier from liability by contract: 82 Am. Dec. 290-295.

Duty of carrier to inform passenger, where the information would tend to prevent his exposing himself to danger and injury: 7 Am. St. Rep. 830-836.

sented himself at the proper place to be transported: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700. The relation of carrier and passenger does not, ordinarily, arise until the traveler puts himself in charge of the carrier for the purpose of being conveyed to his destination: *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444; but a person may become a passenger before the transportation has actually commenced: *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261.

*Contract.*—The relation of carrier and passenger can be created only by contract, express or implied: *Schepers v. Union Depot R. R. Co.*, 126 Mo. 665. There must be an offer to become a passenger on the one part and an acceptance of the offer on the part of the carrier: *Schaefer v. St. Louis etc. Ry. Co.*, 128 Mo. 64. "There is hardly ever," says Knowlton, J., in *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298, "any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations." In general, the question, therefore, is, whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298. The person must, in some manner, indicate his intention of becoming a passenger, and place himself in charge of the carrier: *Higley v. Gilmer*, 3 Mont. 90; 35 Am. Rep. 450.

If he goes upon the carrier's premises, into a station, ticket office, or waiting-room, with an intention, in good faith, of becoming a passenger, he occupies, ordinarily, the status of a passenger: *Hansley v. Jamesville etc. R. R. Co.*, 115 N. C. 602; 44 Am. St. Rep. 474; although he has not purchased a ticket: *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72; or the agent has refused to sell him one: *Norfolk etc. R. R. Co. v. Galliher*, 89 Va. 639. If he enters the office or waiting-room at a depot and informs the depot agent of his desire to become a passenger and is directed by the agent as to the manner in which he shall get on a caboose-car, there is sufficient evidence to justify a finding that the relation of carrier and passenger exists: *Allender v. Chicago etc. R. R. Co.*, 37 Iowa, 264. If a railroad company runs a stage for the purpose of carrying passengers to and from its depot, one who is riding in the stage to the station for the purpose of taking passage on a train is a passenger, and may recover damages for an



injury received through the negligence of the stagedriver, though he has not bought a ticket nor made any declaration of his intention to do so: *Buffett v. Troy etc. R. R. Co.*, 40 N. Y. 168. The driver of an omnibus, by stopping in response to a signal, to take up a person, thereby makes him a passenger: *Brien v. Bennett*, 8 Car. & P. 724.

*Who are not Passengers, Generally.*—Running to catch a train does not constitute one a passenger who is not seen by the trainmen: *Jones v. Boston etc. R. R.*, 163 Mass. 245. So one who enters a railway station intending, bona fide, to take a certain train, but, finding it gone, waits in the station for a horse-car, is not a passenger: *Heinlein v. Boston etc. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676. And a person who walks toward a station, intending to buy a ticket and to take a train after he gets there, is not a passenger before he reaches the station, even if he might be one in the same place if he had begun his journey: *June v. Boston etc. R. R. Co.*, 153 Mass. 79. Neither is one a passenger who is at a railroad station by mere permission or sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road: *Pittsburgh etc. Ry. Co. v. Bingham*, 29 Ohio St. 364; 23 Am. Rep. 751; such as a mere sightseer, who goes upon a railroad platform to see a distinguished party of travelers: *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; or a person who goes upon the premises of a railroad company from motives of curiosity, or for the transaction of business not connected with the company: *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; *Diebold v. Pennsylvania R. R. Co.*, 50 N. J. L. 478. A person may come upon the premises of a railroad company within a reasonable time next prior to the regular time of departure of the train on which he intends to go, and remain until such train leaves, but he cannot claim protection as a passenger, although he has a ticket, if his intention is merely to leave at some indefinite time in the future: *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337. The relation of carrier and passenger does not arise between a railway company and a child, who, without permission from the person in charge of a train, enters a car for the purpose of taking a ride while the cars are being pulled back and forth at a railway station, with the intention of removing them from the track on which they entered the station, and forming them into a train to be used in the future: *Reary v. Louisville etc. Ry. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497. One not accepted as a passenger, and who is on a train without the knowledge or consent of the company, in a car devoted exclusively to the railway mail service, where he was forbidden by notice to remain, and where the employes, in the discharge of their ordinary duties, would not discover him, though possessed of a ticket entitling him to transportation, is not a passenger, and is not entitled to recover for injuries arising from a collision: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585. A carrier, in undertaking to transport passengers safely, undertakes to so carry them only when they place themselves under his direction in particular places prescribed for the purpose. He is not answerable, in damages, for injuries caused to an interloper who, unnoticed

by him, hides in a place not intended for the transportation of passengers: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585. A person who runs rapidly from the direction of a public street across a railroad track on which an engine and cars are approaching, ostensibly for the purpose of taking passage upon another train that is about to start on the track beyond, but who is struck and killed, is not a passenger for whose death a statutory action can be maintained, although when the accident occurred, he had in his pocket a ten-trip ticket, entitling him to ride over the road and upon the train which he was apparently trying to catch: *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298.

*Presumptions.*—One traveling by a passenger train, and who is not connected with the railroad company, is presumed to be a passenger traveling for a consideration, and the burden is on the carrier to prove that he is a trespasser: *Note to Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 293; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229; *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827; *People v. Douglass*, 87 Cal. 281; *Atchison etc. R. R. Co. v. Headland*, 18 Colo. 477; *Bryant v. Chicago etc. Ry. Co.*, 53 Fed. Rep. 997. On the person of a passenger killed by the negligence of a railway company were found a nontransferable pass issued to another person, and a conductor's check; and it was held that it must be presumed that he was a lawful passenger: *Louisville etc. Ry. Co. v. Thompson*, 107 Ind. 442; 57 Am. Rep. 120. The presumption, however, that one found on a railway car is a lawful passenger, may be rebutted: *People v. Douglass*, 87 Cal. 281. On the other hand, with respect to a person not in the service of the carrier and riding upon a train not designed for the transportation of passengers, the presumption of law is, that he is not a passenger and not lawfully on the train, and no liability for negligence can be imposed upon the carrier as to him, unless the special circumstances of the case rebut this presumption: *Note to Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 293; *Atchison etc. R. R. Co. v. Headland*, 18 Colo. 477. The fact that a person was found in a caboose-car, attached to a freight train, is not sufficient, of itself, to justify a court in assuming that the company had undertaken, as to him, the duties and obligations of a carrier of passengers. In the absence of proof to the contrary, the presumption is that he was not a passenger: *Atchison etc. R. R. Co. v. Headland*, 18 Colo. 477. As no presumption of law or fact arises where a person is found on a car not used for the accommodation of passengers, it is for the jury to determine whether such person is a passenger or trespasser upon the train: *People v. Douglass*, 87 Cal. 281; *Waterbury v. New York etc. R. R. Co.*, 17 Fed. Rep. 671. A through passenger train arriving at a way station is ordinarily waiting for passengers so long as it remains there, and one intending to take passage on it may presume that it is so waiting: *Chicago etc. R. R. Co. v. Chancellor*, 60 Ill. App. 525.

If a steamboat lands at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who goes on board does so as a passenger, unless he notifies an officer of the boat that he is a passenger, so as to relieve the

officers from the duty of giving to such as do not come aboard as passengers proper time and facilities for getting ashore: *Keokuk Packet Co. v. Henry*, 50 Ill. 264. If a person, by his own solicitation or consent, is carried on a vehicle or conveyance not used for the purpose of carrying passengers, there can be no presumption that he is a passenger, although the owner is a common carrier of passengers by other and different means of conveyance: *Snyder v. Natchez etc. R. R. Co.*, 42 La. Ann. 302. If, by the rules of a railroad company, persons are forbidden to ride upon a particular train, the presumption exists that anyone who claims to be a passenger upon such a train is an intruder; but, notwithstanding the prohibition, such presumption does not exist when it is shown that passengers are habitually transported on such train, with the knowledge of the company, and without objection on its part: *Prince v. International etc. Ry. Co.*, 64 Tex. 144.

*Purchase of Tickets.*—The purchase of a ticket between two railway stations ordinarily creates the relation of carrier and passenger, with all the duties the law imposes on each: *Wabash etc. Ry. Co. v. Rector*, 104 Ill. 296. It is not necessary that the ticket should have been purchased from the carrier himself, or from an authorized agent of the carrier, or that it be paid for at the time of its purchase. Thus, if a benefit society hires a train for an excursion, and tickets are sold by the treasurer of the society, this is evidence for the jury that the buyer was a passenger: *Skinner v. London etc. Ry. Co.*, 5 Ex. 787. So a person who buys a "scalper's" ticket, in a state where such sale is not unlawful, is a passenger while riding on such ticket in another state, over the line by which such ticket was issued, although the sale would, by statute, have been unlawful in the latter state: *Sleeper v. Pennsylvania R. R. Co.*, 100 Pa. St. 259; 45 Am. Rep. 380. Compare *State v. Ray*, 109 N. C. 736. A person who gets a ticket on his promise to pay the agent therefor on his return, there not being time to pay before the starting of the train, and who does thereafter pay for it, is to be treated as a purchaser thereof: *Ellsworth v. Chicago etc. Ry. Co.*, 95 Iowa, 98.

The mere purchase of a railroad ticket, however, does not make a passenger of the buyer, unless he puts himself in the carrier's charge. A passenger may buy his ticket at an office which is not in the same town, or even in the same state, in which he intends to take the cars. The railroad company has no control over his movements, and he does not, therefore, by the purchase of a ticket, under such circumstances, put himself under the charge of the carrier: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; but if he is passing from the office or place of business where the purchase was made to the train, to take his seat in the cars, on the premises belonging to the company, connected with the railroad, and under the direction of the company's agents, given to him as a passenger with whom the company has made the contract for conveyance, which the purchase of the tickets creates, he is to be considered as a passenger, and entitled to the rights of a passenger while so passing: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700.

The purchase of a ticket before entering a train is not necessary



to constitute a person a passenger: *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267; 29 Am. St. Rep. 718; *Norfolk etc. R. R. Co. v. Galliher*, 89 Va. 639; *Gardner v. Waycross etc. R. R. Co.*, 94 Ga. 538; *Allender v. Chicago etc. R. R. Co.*, 37 Iowa, 264; *Spannagle v. Chicago etc. R. R. Co.*, 31 Ill. App. 460; *Secord v. St. Paul etc. Ry. Co.*, 18 Fed. Rep. 221. Every citizen is prima facie entitled to become a passenger on a railway train: *Norfolk etc. R. R. Co. v. Galliher*, 89 Va. 639; and the right to go upon it does not depend upon the purchase of a ticket, unless the rules of the company require that all persons shall purchase tickets before they enter the cars. The procuring of a ticket only furnishes evidence of an intent to go upon the train: *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337. Hence, one who enters a passenger-car, after the train is made up and ready, for the purpose of taking passage thereon, intending to pay fare and being prepared to do so, is a passenger, though he has not procured a ticket: *Missouri etc. Ry. Co. v. Simmons*, 12 Tex. Civ. App. 500; *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72. Under such circumstances, he is a passenger as a matter of law: *Cross v. Kansas City etc. R. R. Co.*, 56 Mo. App. 664. If a person enters a railroad car as a passenger, either with or without a ticket, he is rightfully there, but the instant he refuses to pay his full fare and comply with the reasonable regulations of the company he becomes a trespasser: *Lake Erie etc. R. R. Co. v. Mays*, 4 Ind. App. 413. A person who is going a short distance and gets on a train about to start from a station at which there is no ticket office, is a passenger, though he has not purchased a ticket, if he has money with him with which to buy a ticket: *Gardner v. Waycross etc. R. R. Co.*, 97 Ga. 482; 54 Am. St. Rep. 435. The purchase of a round-trip ticket does not create the relation of carrier and passenger as to any particular train: *Spannagle v. Chicago etc. R. R. Co.*, 31 Ill. App. 460. Under a statute fixing the rates to be charged by railroads for carrying passengers when the fare is paid to the conductor, one who in good faith boards a passenger train without a ticket, intending to pay his fare to the conductor, becomes a passenger: *Houston etc. R. R. Co. v. Washington, Tex. Civ. App.*, April, 1895. See *Riding on Certain Tickets*, *infra*.

*Waiting—Passing About on Premises, etc.*—An entry into the cars upon a railroad, is not essential to create the relation of carrier and passenger: *Gordon v. Grand Street etc. R. R. Co.*, 40 Barb. 546; *Norfolk etc. R. R. Co. v. Galliher*, 89 Va. 639; *Baltimore etc. R. R. Co. v. State*, 63 Md. 135; *Allender v. Chicago etc. R. R. Co.*, 37 Iowa, 264; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261. Being within the waiting-room, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of a car: *Gordon v. Grand Street etc. R. R. Co.*, 40 Barb. 546; and a person who enters a ticket office of a railroad company, to buy a ticket, is entitled to protection as a passenger, though the agent refuses to sell him one: *Norfolk etc. R. R. Co. v. Galliher*, 89 Va. 639. One who has a railroad ticket and is present to take the train at the ordinary point of departure is a passenger, though he has not entered the cars: *Central R. R. etc. Co. v. Perry*, 58 Ga. 461. Compare *Carpenter v. Boston etc. R. R. Co.*,

97 N. Y. 494; 49 Am. Rep. 540. Even before the purchase of a ticket, a person who applies, in good faith, to an agent for a ticket for a passage on the caboose of a freight-car, and is referred by him to the conductor, is a passenger, and may recover for an injury received before getting on the train: *Allender v. Chicago etc. R. R. Co.*, 31 Iowa, 264. So a person waiting at a station for passage upon a train, soon to depart, and who is invited by the ticket agent to sit in an empty car, standing on a sidetrack, while the station room is being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting-room. In either place, the person is a passenger in the care of the company: *Shannon v. Boston etc. R. R. Co.*, 78 Me. 52. It is different, however, where a person, waiting for a train, has not placed himself in charge of the carrier; as where he is at a boarding-house and saloon, between two and three hundred feet from the depot, and, upon the arrival of the train, is injured while trying to get thereon after it has made a short stop, and is again in motion: *Spannagle v. Chicago etc. R. R. Co.*, 31 Ill. App. 460. One waiting to take passage upon a train which is awaiting the reception of passengers is a passenger, and, if negligently injured, during the time, by the switching of a freight train, may recover therefor: *Chicago etc. R. R. Co. v. Chancellor*, 60 Ill. App. 525. A person injured while walking on the customary route which connects a steamboat with a railway is injured while traveling by public conveyance, as a passenger, within the meaning of a policy insuring against personal injuries when caused by an accident while traveling "by public or private conveyances provided for the transportation of passengers": *Northrup v. Railway etc. Assur. Co.*, 43 N. Y. 516; 3 Am. Rep. 724.

If a person has purchased a ticket and is crossing a railroad track by and under the direction of the ticket agent, for the purpose of taking the train, he is to be considered as a passenger, and, as such, entitled to all the rights and protection of one: *Baltimore etc. R. R. Co. v. State*, 63 Md. 135; *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *Commonwealth v. Boston etc. R. R.*, 129 Mass. 500; 37 Am. Rep. 382. Compare *Chicago etc. R. R. Co. v. Chancellor*, 60 Ill. App. 525. In *Indiana Cent. Ry. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254, it is held, however, that a person who has secured a railroad ticket and is merely crossing a sidetrack for the purpose of taking the train, is not a passenger and cannot recover as such, if he is injured by being struck by the train. This is upon the ground that the relation of carrier and passenger is founded in contract, express or implied, and that such person is not to be considered a passenger at the time of the accident, as no contract for his carriage, either express or implied, had then been entered into. One is a passenger when he enters a car and it is announced that the car is ready to receive passengers: *Hannibal etc. R. R. Co. v. Martin*, 11 Ill. App. 386; and a person upon the gangplank of a steamboat, going thereon for the purpose of taking passage, is a passenger: *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306.

*Boarding Trains, etc.*—One who enters a railroad car intending, in good faith, to become a passenger, is such in fact: *Cross v. Kansas City etc. R. R. Co.*, 56 Mo. App. 664; *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72; *Missouri etc. Ry. Co. v. Simmons*, 12 Tex. Civ. App. 500. But one who boards a moving train and stands on the platform until he falls off on account of the swaying of the train is not a passenger: *Merrill v. Eastern R. R. Co.*, 139 Mass. 238; 52 Am. Rep. 705. If he has a ticket, however, and secures a standing on the step of the car, with a firm hold of each side rail, he is a passenger: *Sharrer v. Paxson*, 171 Pa. St. 26. A person waiting at a flag station to board a freight train, and who attempts, upon the conductor's invitation, to get upon the train while it moves at the rate of four miles an hour, is a passenger: *Murphy v. St. Louis etc. R. R. Co.*, 43 Mo. App. 342. If there is no ticket office at a flag station, but a person properly signifies his intention to get upon a passenger train which has actually stopped, he is entitled to the rights of a passenger: *Western etc. R. R. Co. v. Voils*, 98 Ga. 446.

A person who gets upon a railroad train after it has started does not become a "passenger" within the meaning of a statute authorizing an action for the wrongful death of a passenger upon a railroad train, until he reaches a place of safety inside of the car intended for him to ride in: *Merrill v. Eastern R. R. Co.*, 139 Mass. 238; 52 Am. Rep. 705. If a person without a ticket or the payment of fare attempts to board the caboose of a freight train, at a place where the company does not usually receive passengers, and without the knowledge of those in charge of the train, he is not a passenger, and there can be no recovery for an injury occasioned by his act: *Haase v. Oregon Ry. & Nav. Co.*, 19 Or. 354. And if a person signals a passenger train at night, and it stops, but not at a regular stopping-place, and such person endeavors to enter, though with reasonable caution, and is injured by the sudden starting of the train, he cannot recover for the injury, if his purpose to take passage was unknown to the conductor and other trainmen, as he had not acquired, at the time of his injury, the rights of a passenger: *Georgia Pac. Ry. Co. v. Robinson*, 68 Miss. 643. It was held, furthermore, in this case, that the fact that he succeeded in entering the car, and that the conductor, finding him there, collected fare from him as from passengers, could not give color to the past occurrences which had resulted in his injury: *Georgia Pac. Ry. Co. v. Robinson*, 68 Miss. 643. One who endeavors to get upon a car without the knowledge of the trainmen, the car having stopped for the purpose of discharging passengers at a station, where it was not customary to stop for receiving passengers, is not a passenger although he has a ticket: *Jones v. Boston etc. R. R. Co.*, 163 Mass. 245.

*Wrong Train.*—A person who, by mistake, gets on a different train from the one he intended taking passage on, is a passenger on the train he boards, and entitled to his rights as such: *International etc. Ry. Co. v. Gilbert*, 64 Tex. 536; *Columbus etc. Ry. Co. v. Powell*, 40 Ind. 37; *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542; *The Wasco*, 53 Fed. Rep. 546. Thus, if a person has



a ticket for passage upon a railroad and boards a freight train that does not carry passengers, but he believes his ticket to be good on that train, he is to be treated as a passenger and not as a trespasser: *Bogges v. Chesapeake etc. Ry. Co.*, 37 W. Va. 297. So if a person, after boarding a steamer, finds out that a certain landing where he intended to stop is not on the steamer's course, and that he must pay extra fare to stop there, but declines to do so and does not change his purpose of taking passage, he is a passenger from the time he goes on board, and as such can hold the steamer answerable for negligence whereby he is injured: *The Wasco*, 53 Fed. Rep. 546. And one who takes passage upon a limited railway ticket, without knowledge that under the rules and regulations of the company the ticket cannot be used, is not to be treated as a trespasser, but as a passenger who, by mistake, has entered a train upon which, by his contract, he is not entitled to ride; and whether he had or not such knowledge, so as to make him a trespasser or a passenger, is a question of fact for the jury: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542.

A person has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket: *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13; *Trothinger v. East Tennessee etc. R. R. Co.*, 11 Lea, 533. It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the company: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780; *Lake Shore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519; and, if he takes the wrong conveyance, it is the duty of the carrier to inform him, and put him off at the proper place: *Lake Shore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519; for a railway company owes a duty to every passenger who, in good faith, purchases a ticket and enters any of its conveyances: *Lake Shore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519; and the fact that a person has taken passage on a train that does not stop at the station where he desires to get off does not affect the measure of duty of the railroad company, or the degree of protection to which he is entitled against the negligent acts of its servants. The company owes to him, while he is on the train, the same duty of protection against negligence as to the other passengers: *Lewis v. President etc. Canal Co.*, 145 N. Y. 508.

*Invitations to Ride—Consent.*—The owner of a vehicle or conveyance of any kind is not answerable for the negligence of his servant in the transportation of passengers received by the servant, without an express or implied authority to receive them: *Lygo v. Newbold*, 9 Ex. 502. Hence, if a person is invited to ride upon a train of cars by an employé, who had no authority to give such invitation, the party is either a trespasser or a mere licensee, and is not, therefore, entitled to protection as a passenger: *Springer v. Byram*, 137 Ind. 15, 27; 45 Am. St. Rep. 159. In some jurisdictions it is not within the power of a conductor, brakeman, or other employé of a railroad company to permit a person to ride upon a vehicle not intended for the conveyance of passenger: *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444; and if such person does so, even upon the in-

vitiation of such employé, and although he and others have customarily so ridden, the person thus traveling does not thereby become a passenger: *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444.

An engineer of a passenger train has, ordinarily, no right or power to create passenger relations by inviting a person to board a train: *Ohio etc. Ry. Co. v. Allender*, 59 Ill. App. 620. His place is on his engine, and his duties and authority, as to the management of the train, are subordinate to those of the conductor. He has no authority to permit persons to ride upon the train, and the granting of any such permission by him is an act beyond the scope of his employment, and for which the railroad company is not answerable: *Chicago etc. R. R. Co. v. Casey*, 9 Ill. App. 632. He certainly cannot give permission to anyone to ride upon his engine against the rules of the company. The conductor, however, having control of the train might, perhaps, give such permission; and, if he knows that a party is so riding on the engine, and suffers him to remain, his act may be considered that of the company: *Chicago etc. R. R. Co. v. Michie*, 83 Ill. 427. But, if the rules of the company forbid persons from being carried on freight trains, and the conductor has no authority to relax the rule, his consent to letting a boy remain on the train, and who got thereon with a knowledge of the conductor's powers, does not make the boy a passenger, rendering the company liable for injuries received by him for wrongful acts of the servant done without the scope of his employment: *Texas etc. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745. A person who rides on the locomotive engine of a freight train, without the knowledge or consent of the conductor in charge thereof, but under an agreement with the fireman to shovel coal for the privilege of riding, is not a passenger: *Woolsey v. Chicago etc. R. R. Co.*, 39 Neb. 798. But, if the engineer of a freight train, acting as conductor, gives a person permission to ride thereon, and the latter pays fare, it has been held that he is entitled to the privileges of a passenger, although the engineer has been forbidden to receive passengers on the train; provided the passenger does not know of such rules: *Hanson v. Mansfield etc. Transp. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162.

A baggage master has no authority to grant permission to persons to ride on the cars of a railway train which is in charge of another person at the time. The granting of such permission is not within the scope of his employment, and cannot affect the rights or obligations of the company by which he is employed, especially where the permission is in direct violation of its rules and regulations: *Reary v. Louisville etc. Ry. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497.

A section master of a railroad company who takes upon a hand-car, used by him in the performance of his duties, a person walking along the track, does not thereby make the company answerable to such person as a passenger in case he is injured by a collision: *Willis v. Atlantic etc. R. R. Co.*, 120 N. C. 508. In the absence of proof that a railway company is accustomed to carry passengers upon hand-cars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the

section foreman: *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65; 35 Am. Rep. 299.

It has been held that, as the conductor in charge of a construction train is the representative of the railroad company and the manager of the train, his action in receiving persons upon the train and collecting fare from them, ordinarily entitles them to the rights of passengers: *Chicago etc. R. R. Co. v. Frazer*, 55 Kan. 582. But a superintendent of construction who, in the course of his employment, invites a bridge superintendent to go to a point on the line where the construction is incomplete does not, by such invitation, make the bridge superintendent a passenger of the company: *Evansville etc. R. R. Co. v. Barnes*, 137 Ind. 306.

Although a train is one on which passengers are not allowed to be carried, yet, if a person boards it without the permission or knowledge of the conductor, he is entitled to the same protection as if he had paid his fare, where the conductor, after becoming aware of his presence on the train, suffers him to remain: *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62; 37 Am. Rep. 423. If a conductor has entire charge of a train, and, in its management, acts for, and represents, the railroad company, it being a part of his duties to see that persons do not ride upon it either with or without the payment of fare, his act in allowing a person to ride upon the train, without the payment of fare, is within the scope of his employment: *Whitehead v. St. Louis etc. Ry. Co.*, 99 Mo. 263. On the other hand, it has been held that the failure of those in charge of a train, on which a person has wrongfully taken passage, to warn him to get off, cannot be construed into a permission to become a passenger on the train: *Brown v. Scarboro*, 97 Ala. 316.

*Payment of Fare.*—Common carriers have the right, of course, to demand of passengers, applying for transportation, prepayment of fare. If payment in advance is not demanded, they must rely on the integrity and responsibility of the passengers, or their lien on their baggage: *Hurt v. Southern R. R. Co.*, 40 Miss. 391; *Poole v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289. But, as said above, the actual payment of fare is not essential to the status of a passenger: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17; *The Wasco*, 53 Fed. Rep. 546; *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246; *Buffett v. Troy etc. R. R. Co.*, 40 N. Y. 168; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Gordon v. Grand Street etc. R. R. Co.*, 40 Barb. 546; *Murphy v. St. Louis etc. Ry. Co.*, 43 Mo. App. 342, 346; *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442. The liability of a passenger carrier is not affected by the fact that no fare was collected from the injured passenger. The only inquiry is, whether or not he was lawfully on the train: *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336. It is not essential to establish the relation of carrier and passenger that the fare should be paid in advance, or tendered. It is enough that it is understood that it is to be paid: *Nashville etc. R. R. Co. v. Messino*, 1 Sneed, 220. A railway company is answerable for its negligence, which results in an injury to a passenger, who is lawfully on its cars, whether he has been charged with and pays his fare or not: *Prince v. International*



etc. Ry. Co., 64 Tex. 144; Gulf etc. Ry. Co. v. Wilson, 79 Tex. 371; 23 Am. St. Rep. 345.

One who fraudulently evades the payment of his fare upon a railway train is not a passenger: *Oondran v. Chicago etc. Ry. Co.*, 67 Fed. Rep. 522. But, if he pays, when requested by the conductor, he must be treated as a passenger: *Fordyce v. Beecher*, 2 Tex. Civ. App. 29. A mere trespasser upon a train, or a person who steals a ride thereon, is not a passenger, nor entitled to protection as such: Note to *Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 293. If a person, by fraud or stealth, gets upon a carrier's vehicle, without the knowledge of the carrier or his servant, and is either killed or injured through the negligence of either, no action can be maintained for such death or injury, as such person is not a passenger: Note to *Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 293; *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245; *Chicago etc. R. R. Co. v. Mehlsack*, 131 Ill. 61; 19 Am. St. Rep. 17; *Farber v. Missouri Pac. Ry. Co.*, 116 Mo. 81. A person who clandestinely enters a box-car on a freight train of a railroad company to beat his way over the road is not a passenger: *Hendryx v. Kansas City etc. R. R. Co.*, 45 Kan. 377.

No recovery can be had against a railway company for a personal injury to a passenger on its train of cars, or for his death, caused by mere negligence, when he knowingly and fraudulently induces the conductor to disregard his duty and defraud the company out of the amount of his fare for his own profit: *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245.

The instant that one who is rightfully on a train refuses to pay his full fare, and to comply with the reasonable regulations of the company, he becomes a trespasser ab initio: *Lake Erie etc. R. R. Co. v. Mays*, 4 Ind. App. 413; *Moore v. Columbia etc. R. R. Co.*, 38 S. C. 1; *Fulton v. Grand Trunk Ry. Co.*, 17 U. C. Q. B. 428; *Higley v. Gilmer*, 3 Mont. 90; 35 Am. Rep. 450; *Gilmer v. Higley*, 110 U. S. 47, 49; *Terre Haute etc. R. R. Co. v. Fitzgerald*, 47 Ind. 79; *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204; 25 Am. St. Rep. 35; *Lillis v. St. Louis etc. R. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255. If a person refuses to pay his fare and causes the train to be stopped so that he may be put off, and then, but not before, offers to pay his fare, he is not a passenger: *People v. Jillson*, 3 Park. C. C. 234. But a passenger on a railway train may rightfully refuse to pay fare unless he is provided with a seat, and he does not become a trespasser on the train by so refusing: *Hardenbergh v. St. Paul etc. Ry. Co.*, 39 Minn. 3; 12 Am. St. Rep. 610.

If one, being rightfully on a train, pays his fare to the proper person, such payment, if received, constitutes unequivocal evidence of the relation of carrier and passenger: *Poole v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289. But it should be paid to one authorized to receive it. Thus, a trespasser does not become a passenger by paying money to a brakeman on a freight train, nor does he, by so doing, obtain any of a passenger's rights, for it is not within the scope or authority, apparent or real, of a brakeman to collect fare: *McNamara v. Great Northern Ry. Co.*, 61 Minn. 296. An offer to pay fare to an employé on a freight train, who is not author-

ized to receive it, is not an offer to the company, and does not entitle the person making such offer to a place on the train as a passenger: *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457. It is immaterial at what time the fare is paid, if it is paid when demanded by the proper officer: *Russ v. Steamboat War Eagle*, 14 Iowa, 363; and one person may pay for another: *Marshall v. York etc. Ry. Co.*, 11 Com. B. 655.

One who gets aboard a car, for the purpose of becoming a passenger, is entitled to a passenger's rights, and the carrier is answerable to him as such, whether he pays his fare before or after an accident by which he is injured: *Tillett v. Norfolk etc. R. R. Co.*, 118 N. C. 1031; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306. But compare *Packet Co. v. Clough*, 20 Wall. 528; *Gardner v. New Haven etc. Co.*, 51 Conn. 143; 50 Am. Rep. 12.

If the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a passenger, and permits him to be upon a forbidden part of the train, or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if, without notice, express or implied, of the rules, or of the conductor's disobedience: *McVeety v. St. Paul etc. Ry. Co.*, 45 Minn. 268; 22 Am. St. Rep. 728.

*Free Passengers.*—As payment of fare is not necessary to constitute the relation of carrier and passenger (*Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246; *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336; *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101) it follows that persons may be free passengers; and that a carrier is liable to persons whom it accepts for transportation, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare: *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550; *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101; *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; *State v. Western etc. R. R. Co.*, 63 Md. 433; *Lemon v. Chanslor*, 68 Mo. 340; 30 Am. Rep. 799; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Waterbury v. New York etc. R. R. Co.*, 17 Fed. Rep. 671; *Gulf etc. Ry. Co. v. McGown*, 65 Tex. 640.

Thus, a person riding free, and in the baggage-car of a train, with knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger-car: *Washburn v. Nashville etc. R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784. So the circumstance that the passenger was a "steamboat man," and as such carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers, especially where it is the custom to carry such persons free: *Steamboat New World v. King*, 16 How. 469. And, if a person injured in a railway collision, occasioned by the negligence of the company's servants, sues the company, he is entitled to recover, although he was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars: *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468. A person riding

free upon a train at the invitation of the general agent of the company, being there to inspect levees that protect the road, must be deemed a passenger: *Thompson v. Yazoo etc. R. R. Co.*, 47 La. Ann. 1107.

One who rides free by consent of the carrier, fairly obtained, is a passenger: *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125; 18 Am. Rep. 360; as where the owner of a patented car coupler, with the consent of a railroad company, rides on its train in the course of negotiations for the adoption of his patent: *Railway Co. v. Stevens*, 95 U. S. 655. So, if the mother of a child, just old enough to require the payment of half fare, holding it in her arms, takes a ticket on a train for herself, but not for the child, and the child is injured on the journey by an accident caused through the negligence of the railroad company, the child may recover therefor, where, at the time its mother took her ticket, no question was asked by the defendants' servants as to the age of the child, and there was no intention on the part of the mother to defraud the company: *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442.

It has also been held that one who rides free on a railroad train with the consent of the conductor is a passenger: *Washburn v. Nashville etc. R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784.

*Free Passes.*—So far as concerns a carrier's liability for negligence, we understand, from the decisions, that a person riding on a free pass is a passenger, and that the carrier is answerable to him to the same extent as he is to those who pay full fare, because the carrier has no power to exempt himself, by special contract, from the consequences of his own negligence, or the negligence of his employés: *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126; *Ohio etc. Ry. Co. v. Nickless*, 71 Ind. 271; *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Thompson v. Yazoo etc. R. R. Co.*, 47 La. Ann. 1107. Contra, *Kinney v. Central R. R.*, 34 N. J. L. 513; 3 Am. Rep. 265; *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115; *Ulrich v. New York etc. R. R. Co.*, 108 N. Y. 80; 2 Am. St. Rep. 369, and note thereto, showing when a pass is not free or gratuitous.

A railroad company may be held answerable for its negligence resulting in injury to one riding upon an employé's pass: *State v. Western etc. R. R. Co.*, 63 Md. 433; and a person may, at one time, be an employé when passing over a railroad, and at another time, in passing over the same road be a passenger, though continuing all the while, in a popular sense, in the employment of the company: *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66; 44 Am. St. Rep. 335. The rule that a railway corporation cannot, by stipulation, exempt itself from liability for injuries received by a passenger from the negligence of the corporation or its employés extends to and in favor of an employé riding on a train as a passenger, though without the payment of fare, if the circumstances are such that his right to so ride may be regarded as a part of the compensation for his services rendered to the corporation: *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66; 44 Am.



St. Rep. 335; 166 Mass. 492; 55 Am. St. Rep. 417. One who is employed as a clerk of a railway corporation, subject to be discharged at any time, and who resides out of the city in which his work is to be done, and who, under a uniform custom on the part of the corporation with respect to its employes residing out of the city, is furnished with a pass to his home over its line, and who rides upon such pass, is not to be deemed a gratuitous passenger. The pass is a part of the compensation for his services, and gives him the same rights as if he paid therefor in money: *Doyle v. Fitchburg R. R. Co.*, 166 Mass. 492; 55 Am. St. Rep. 417. This suggests the principle that, if the pass is given for a valuable consideration, the one riding upon it is a passenger for hire.

*Drover's Pass*.—A person traveling on a railroad train upon a "drover's pass" or "stock pass," for the purpose of taking care of his stock on the train, is a passenger for hire. The consideration for his passage is to be found in the services he renders in caring for the stock, or in the charges made for shipping the stock. The railway company, therefore, owes him the same duties of care that it owes to any other passenger upon a freight train; and, if he is injured on the trip, through the negligence of the carrier, he may recover therefor, notwithstanding a stipulation that the carrier shall be exempt, because the law will not allow the carrier to stipulate against its own negligence, even on a freight train: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Missouri Pac. Ry. Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; *Delaware etc. R. R. Co. v. Ashley*, 67 Fed. Rep. 209; *Saunders v. Southern Pac. Co.*, 13 Utah, 275; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Smith v. New York Cent. R. R. Co.*, 24 N. Y. 222; *Tibby v. Missouri Pac. Ry. Co.*, 82 Mo. 292; *Indianapolis etc. Ry. Co. v. Beaver*, 41 Ind. 493; *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382; *Lawson v. Chicago etc. Ry. Co.*, 64 Wis. 447; 54 Am. Rep. 634; *Little Rock etc. Ry. v. Miles*, 40 Ark. 298; 48 Am. Rep. 10; *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Illinois Cent. R. R. Co. v. Foley*, 53 Fed. Rep. 459; *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40; *Chicago etc. Ry. Co. v. Carpenter*, 56 Fed. Rep. 451; *Flinn v. Philadelphia etc. R. R. Co.*, 1 Houst. 469; *Olsen v. St. Paul etc. R. R. Co.*, 45 Minn. 536; 22 Am. St. Rep. 749; *Graham v. Pacific R. R. Co.*, 66 Mo. 536; *Griffith v. Missouri Pac. Ry. Co.*, 98 Mo. 168; *Gulf etc. Ry. Co. v. Cole*, 8 Tex. Civ. App. 635. Contra, *Gallin v. London etc. Ry. Co.*, L. R. 10 Q. B. 212; *Poucher v. New York Cent. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364; *Gardner v. New Haven etc. Co.*, 51 Conn. 143; 50 Am. Rep. 12. If one travels, by consent of a railroad company, upon a freight train, in charge of cattle which are being transported for him, he is a passenger for hire, whether supplied with a drover's pass or not: *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40. The existence of contributory negligence on the part of the one traveling on such a pass would, of course, preclude a recovery, but this should generally be submitted to a jury: *Omaha etc. Ry. Co.*

v. Crow, 47 Neb. 84; Little Rock etc. Ry. v. Miles, 40 Ark. 298; 48 Am. Rep. 10; Waterbury v. New York etc. R. R. Co., 17 Fed. Rep. 671; Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510; Chicago etc. Ry. Co. v. Carpenter, 56 Fed. Rep. 451.

If a minor is knowingly received by a conductor as assistant to a drover, under a drover's pass which contains a provision that no minor shall be permitted to travel under such a pass, such minor is a passenger: Texas etc. Ry. Co. v. Garcia, 62 Tex. 285. It is only the holder of a drover's pass who can avail himself of its privileges. Another person who claims an interest in the stock, who assists him, and who boards the train with the shipper without procuring a ticket or tendering his fare, intending to ride free, does not thereby become a passenger: Richmond etc. R. R. Co. v. Burnsed, 70 Miss. 437; 35 Am. St. Rep. 656; Gardner v. New Haven etc. Co., 51 Conn. 143; 50 Am. Rep. 12. If, however, a car is entered by a shipper of stock and one servant, and, upon the conductor's objection that both cannot ride free, the shipper informs him that the employé may be put off, but no further objection is made, and the shipper is injured, he is a passenger, and not a trespasser by reason of having the employé on the train: Missouri Pac. Ry. Co. v. Aiken, 71 Tex. 373.

*Place of Riding.*—Railroad companies not only have the right, but it is their duty, to run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to comply therewith, if reasonable: Chicago etc. R. R. Co. v. Field, 7 Ind. App. 172; 52 Am. St. Rep. 444; and a rule that passengers shall remain in the cars set apart for them, and shall not ride in a baggage or an express car or other place of increased danger, is reasonable: Florida etc. Ry. Co. v. Hirst, 30 Fla. 1; 32 Am. St. Rep. 17. While it is the duty of a railroad conductor to enforce a rule of the company requiring passengers to ride in passenger cars, yet the obligation upon passengers and the protection of the company under such rule are not entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement: Florida etc. Ry. Co. v. Hirst, 30 Fla. 1; 32 Am. St. Rep. 17. One who takes an exposed position upon a train not designed for the use of passengers assumes the special risks of that position, whether he takes it by the license, noninterference, or express permission of the conductor: Files v. Boston etc. R. R. Co., 149 Mass. 204; 14 Am. St. Rep. 411; monographic note to Hemmingway v. Chicago etc. Ry. Co., 7 Am. St. Rep. 835, on the duty of the carrier to inform a passenger, where the information would tend to prevent his exposing himself to danger and injury. It is without the scope of this note to go into the liability of the carrier in such cases, and the subject may be dismissed with a statement of the general rule, that one who is entitled to ride in a passenger-car, but rides in some other car, where he has no right to be, such as the mail-car, express-car, or baggage-car, or rides in some other exposed place of danger, as on the pilot, tender, or engine, cannot recover for injuries sustained by him, where it appears that he would have escaped injury had he remained in the passenger-car. It is, or may be, according to the circumstances, contributory negligence for a passenger to ride in such places, in vio-

lation of a known rule of the company, even with the permission, connivance, or knowledge of the conductor, or without his protestations, when that officer is cognizant of both the rule and its infraction, if by the violation of such rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger-car set apart and offering space for his accommodation. In support of these propositions, see *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17; *Baltimore etc. R. R. Co. v. State*, 72 Md. 36; 20 Am. St. Rep. 454, and note; note to *Bricker v. Philadelphia etc. R. R. Co.*, 19 Am. St. Rep. 587; *Darwin v. Charlotte etc. R. R. Co.*, 23 S. C. 531; 55 Am. Rep. 32, and note; *Merrill v. Eastern R. R. Co.*, 139 Mass. 238; 52 Am. Rep. 705; *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *Choate v. Missouri etc. Ry. Co.*, 67 Mo. App. 105; *Rucker v. Missouri Pac. Ry. Co.*, 61 Tex. 499; *Union Ry. etc. Co. v. Shacklett*, 19 Ill. App. 145; *Gardner v. Waycross Air-Line R. R. Co.*, 97 Ga. 482; 54 Am. St. Rep. 435.

Some cases go further and denounce as a trespasser one who does not go into the passenger-car, but who takes his place in some other part of the train without authority: *Lillis v. St. Louis etc. Ry. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444. It is said, in the case last cited, that common carriers of passengers are not required to notify every person who may board their train that he must enter the passenger coach in order to become a passenger; but that it is the duty of the latter to inquire, upon entering the train, where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him; but if he fails to make such inquiry, and in violation of the company's rules enters a vehicle not set apart for passengers, he becomes a trespasser. A person who takes passage on the platform of a passenger coach on a railroad train, and there continues his journey without entering the cars, in violation of the rules and regulations of the company, does not become a passenger, although his fare is demanded by, and paid to, the brakeman on the train, who is not authorized to demand or receive fares: *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444.

*Freight Trains.*—As a general rule, a railroad company runs freight trains for the transportation of freight, not passengers, and there is a strong tendency to hold that agents of the company, such as a conductor or brakeman on such trains, have no implied authority to receive passengers upon them. It is not within the scope of their authority. So, if one gets on a train made up exclusively of cars appropriate alone for the carrying of freight and the employes on such train, he must take notice of the fact that the train is not provided for passengers: *Texas etc. Ry. Co. v. Black*, 87 Tex. 160. It follows that one who boards a freight train is not ordinarily entitled to the rights of a passenger, notwithstanding any license, invitation, or permission to ride, given by a conductor or brakeman, unless the railroad company has, by its conduct, led the public to believe that



passengers will be carried on such trains for hire or otherwise, and especially is this true where the rules of the company forbid the conductor or brakeman from carrying passengers, and this regulation is known to the one boarding the train: *Arkansas etc. Ry. Co. v. Griffith*, 63 Ark. 491; *Candiff v. Louisville etc. R. R. Co.*, 42 La. Ann. 477; *Files v. Boston etc. R. R. Co.*, 149 Mass. 204; 14 Am. St. Rep. 411; *Powers v. Boston etc. R. R.*, 153 Mass. 188; *Brevig v. Chicago etc. Ry. Co.*, 64 Minn. 168; *Janny v. Great Northern Ry. Co.*, 63 Minn. 380; *Smith v. Louisville etc. R. R. Co.*, 124 Ind. 394; *Texas etc. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745; *Houston etc. Ry. Co. v. Moore*, 49 Tex. 31; 30 Am. Rep. 98; *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382; 15 Am. Rep. 513; *Railroad v. Hailey*, 94 Tenn. 383; *Chicago etc. R. R. Co. v. Michie*, 83 Ill. 427; *Duff v. Allegheny etc. R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675; *Gulf etc. Ry. Co. v. Campbell*, 76 Tex. 174. Otherwise expressed, the authorities just cited seem to support the rule that a person who goes aboard a freight train, with or without the invitation or permission of the conductor or brakeman, cannot be regarded as a passenger, where it does not appear that the company, either by usage, or by its rules and regulations, permits passengers on its freight trains: *Smith v. Louisville etc. R. R. Co.*, 124 Ind. 394.

Some cases hold that a passenger riding on a freight train, by direction and permission of the conductor or brakeman, and without notice that his so riding is against the rules of the company, is entitled to the same rights as if he were riding on a passenger train: *McGee v. Missouri Pac. Ry. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706; *Murphy v. St. Louis etc. Ry. Co.*, 43 Mo. App. 342. So, if one believes, in good faith, that some of a company's freight trains are permitted to carry passengers, and goes aboard a freight-car that is not allowed to carry passengers, either with the permission or consent of the conductor or brakeman, or without it, he may be found, by a jury, to be a passenger: *Lucas v. Milwaukee etc. Ry. Co.*, 33 Wis. 41; 14 Am. Rep. 735; *Boehm v. Duluth etc. Ry. Co.*, 91 Wis. 592; *Bogges v. Chesapeake etc. Ry. Co.*, 37 W. Va. 297; *Cain v. Minneapolis etc. Ry. Co.*, 39 Minn. 297; *Everett v. Oregon etc. Ry. Co.*, 9 Utah, 340. And it is not error to charge that "when a railroad company ordinarily carries passengers upon its freight trains, if a passenger, in good faith, boards such a train, and is not informed to the contrary before the train leaves, he becomes a passenger, and is entitled to ride to the first station, if there is nothing in the situation or condition of the train by which he might infer that it did not carry passengers": *Boehm v. Duluth etc. Ry. Co.*, 91 Wis. 592.

While the conductor of a freight train, made up of cars suitable alone for carrying freight, cannot, without authority of the railway company, expressly or tacitly given, receive passengers upon such train and bind the railway for the risks of transportation, such assent may be inferred if the railway company permits its freight trains to carry passengers, or if the servants carry passengers, and this fact is known, or should be known, by the management of the railway: *Texas etc. Ry. Co. v. Black*, 87 Tex. 160. It is sometimes provided by statute that local freight trains may carry passengers,

and one who boards a freight train, where such statute exists, with the consent of the conductor and pays his fare to him has a right to presume that the train is a local one: *Arkansas etc. Ry. Co. v. Griffith*, 63 Ark. 491.

A person riding unlawfully on a freight train is not a passenger: *Planz v. Boston etc. R. R. Co.*, 157 Mass. 377; *Berry v. Missouri Pac. Ry. Co.*, 124 Mo. 223; *Hobbs v. Texas etc. Ry. Co.*, 49 Ark. 357; *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245; *Hendryx v. Kansas City etc. R. R. Co.*, 45 Kan. 377; *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382; 15 Am. Rep. 513. Thus, one is wrongfully on the train where, after the conductor has refused him passage, he is subsequently permitted to board the train by a man with a lantern, employed upon the train: *Gulf etc. Ry. Co. v. Campbell*, 76 Tex. 174; or where the fireman allows him to shovel coal for the privilege of riding, his presence on the train being unknown to the conductor: *Woolsey v. Chicago etc. R. R. Co.*, 39 Neb. 798; or where he is on the train in violation of the rules of the company, if it appears that he had a reasonable opportunity to ascertain the existence of the regulation forbidding the taking of passengers on freight trains, although there was evidence tending to show that conductors frequently violated the regulation: *San Antonio etc. Ry. Co. v. Lynch*, 8 Tex. Civ. App. 513. The payment of fare, on a freight train, or an offer to pay it, to one not authorized to receive it, cannot give one the status of a passenger: *McNamara v. Great Northern Ry. Co.*, 61 Minn. 296; *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457. Even the acceptance of fare by the conductor of a freight train from one riding thereon does not make the latter a passenger, if it does not appear that he was ignorant of the rule forbidding passengers from riding on freight trains: *Texas etc. Ry. Co. v. Black*, 87 Tex. 160. The fact that the conductor of a freight train, after discovering a person in the caboose, does not eject him, does not constitute the latter a passenger, especially where the conductor refused him permission to ride, and no fare was paid: *Atchison etc. R. R. Co. v. Headland*, 18 Colo. 477. A person who has purchased no ticket and paid no fare, who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into the car, at a place where the railroad company is not accustomed to receive passengers, is not a passenger: *Haase v. Oregon Ry. & Nav. Co.*, 19 Or. 354.

On the other hand, if one is lawfully riding on a freight train he must be considered a passenger: *Western etc. R. R. v. Turner*, 72 Ga. 292; 53 Am. Rep. 842; and this rule applies to those permitted by the carrier's servants to ride without paying fare, if the servant was expressly or impliedly authorized to grant such permission: *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62; 37 Am. Rep. 423; *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St. 139; 27 Am. Rep. 693; *Lucas v. Milwaukee etc. Ry. Co.*, 33 Wis. 41; 14 Am. Rep. 735; *Gradin v. St. Paul etc. Ry. Co.*, 30 Minn. 217; *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185; *Secord v. St. Paul etc. Ry. Co.*, 18 Fed. Rep. 221; *Whitehead v. St. Louis etc. Ry. Co.*, 99 Mo. 263.

The question of whether or not a passenger is lawfully upon a train does not necessarily depend upon the purposes to which the train is usually devoted. "If usually employed in the transportation of passengers, a person who has paid his fare, or has been invited to ride free of charge, is presumed to be lawfully upon the train. If, by the rules of the company, passengers are expressly forbidden to be carried upon a particular train, the presumption is, that anyone claiming to be a passenger upon such a train is an intruder and without lawful right to be there. This presumption may be rebutted by showing that, whilst the rules forbid the transportation of passengers upon these trains, yet, with the knowledge of the company, and without objection on its part, they are habitually permitted to take passage upon such trains. The company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them as dispensed with, when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rules on his part would be a disobedience of the orders of his superiors": *Prince v. International etc. Ry. Co.*, 64 Tex. 144.

It is held, in some cases, that if a person goes upon a freight train, without knowing that he is violating a rule of the company, and especially if he is invited to do so by the company's agent, and is allowed to remain there, he must be considered a passenger: *McGee v. Missouri etc. Ry. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706; *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62; 37 Am. Rep. 423; *Everett v. Oregon etc. Ry. Co.*, 9 Utah, 340; *Lucas v. Milwaukee etc. Ry. Co.*, 33 Wis. 41; 14 Am. Rep. 735; *Boehm v. Duluth etc. Ry. Co.*, 91 Wis. 592; *Cain v. Minneapolis etc. Ry. Co.*, 39 Minn. 297; *Boggess v. Chesapeake etc. Ry. Co.*, 37 W. Va. 297.

While a railroad company may not ordinarily carry passengers on its freight trains or locomotives, or hold them out to the public for that purpose, yet if, through its authorized agents, the company accepts passengers for hire upon such trains or engines, it must treat them as passengers and be answerable to them as such: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *International etc. Ry. Co. v. Irvine*, 64 Tex. 529. Hence, if a railway company admits a person into a caboose attached to a freight train, to be transported as a passenger, and takes the customary fare for his transportation as a passenger, such person is a passenger: *New York etc. Ry. Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451; *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 227, affirming same case, 35 Barb. 389. So, if a person enters the saloon-car of a freight railway train, and when the train starts, and without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, such person is a passenger: *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187; 4 Am. Rep. 267.

A person who enters a freight train that habitually carries passengers, and, at the time, does not receive any notice that he cannot



ride thereon, becomes a passenger as he would on a regular passenger train: *Burke v. Missouri Pac. Ry. Co.*, 51 Mo. App. 491; *Jones v. Wabash etc. Ry. Co.*, 17 Mo. App. 158. So a person riding on a freight train, on a car in which the company allows people to travel, with the knowledge of the company or any of its agents, for the purpose of being transported, must be considered a passenger whether he has a ticket or not: *Secord v. St. Paul etc. Ry. Co.*, 18 Fed. Rep. 221. And where the plaintiff came lawfully upon the cab of a railroad freight train, treating with the conductor for passage, as had frequently been done, and as was still being done at the time of the trial by others, the company is answerable for a violent and malicious assault on him by the conductor: *Western etc. R. R. v. Turner*, 72 Ga. 292; 53 Am. Rep. 842.

The rule of liability for negligent injury to a passenger upon a freight or construction train is the same that exists where the train is devoted exclusively to passenger service: *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40; *Indianapolis etc. Ry. Co. v. Beaver*, 41 Ind. 493; *McGee v. Missouri Pac. Ry. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706; *Hazard v. Chicago etc. R. R. Co.*, 1 Biss. 503; *Ohio etc. Ry. Co. v. Dickerson*, 59 Ind. 317; *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336; *Whitehead v. St. Louis etc. Ry. Co.*, 99 Mo. 263; *International etc. Ry. Co. v. Irvine*, 64 Tex. 529; *New York etc. Ry. Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451; *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 227; affirming same case, 35 Barb. 389; *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187; 4 Am. Rep. 267.

*Construction Trains—Hand-cars, etc.*—The conductor of a construction train is the representative of the railroad company and the manager of the train. Hence, his action in receiving passengers upon such train and collecting fare from them ordinarily entitles them to the rights of passengers: *Chicago etc. R. R. Co. v. Frazer*, 55 Kan. 582. Compare *Rosenbaum v. St. Paul etc. R. R. Co.*, 38 Minn. 173; 8 Am. St. Rep. 653; *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185.

If the rules of a railway company forbid the carrying of passengers on hand-cars, one who is carried thereon, and riding at the invitation of an employé of the company, is not a passenger: *Hoar v. Maine etc. R. R. Co.*, 70 Me. 65; 35 Am. Rep. 299; *Gulf etc. Ry. Co. v. Dawkins*, 77 Tex. 228; *Houston etc. Ry. Co. v. Bolling*, 59 Ark. 395; 43 Am. St. Rep. 38. But, if it is shown that a railway employé is authorized to accept a person as a passenger on a hand-car, the company is answerable to him as for a passenger: *Pool v. Chicago etc. Ry. Co.*, 56 Wis. 227. The question as to whether the agent of a railroad company has authority to allow persons to ride on hand-cars as passengers is one for the jury: *International etc. Ry. Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795; *International etc. R. R. Co. v. Cock*, 68 Tex. 713; 2 Am. St. Rep. 521.

The same is true of one who takes passage upon a timber train, which is forbidden to carry other persons than those engaged in the shipment of lumber; and if he takes passage thereon without invitation, or the payment of fare, he is not only not a passenger, but a trespasser: *Railroad v. Meacham*, 91 Tenn. 428. For circumstances

showing when a railroad company may, and may not, be answerable for an injury happening to a person who takes passage on a gravel train, not engaged in the business of transporting passengers: Lawrenceburgh etc. R. R. Co. v. Montgomery, 7 Ind. 474; Keating v. Michigan Cent. R. R. Co., 97 Mich. 154; 37 Am. St. Rep. 328.

If a special train, such as a mixed train, run only during the week for the carriage of freight and passengers, is ordered out on Sunday, made up as usual, and operated by the same conductor and trainmen as during the week, and the conductor in charge permits a person to take passage thereon, such person, being without notice of the conductor's want of authority to permit him to do so, and without any collusion between him and the conductor to defraud the company of its fare, becomes a passenger whether he pays fare or not: Wagner v. Missouri Pac. Ry. Co., 97 Mo. 512.

*Street Cars.*—As in other cases, a contract to be carried on street cars need not be actually consummated by the payment of fare or entry into the car, but may be implied from slight circumstances. The matter rests largely upon the intention of the person at the time he enters the car: North Chicago etc. R. R. Co. v. Williams, 140 Ill. 275. One is a passenger in a street-car who is in the act of stepping on the platform, the car having stopped for him: McDonough v. Metropolitan R. R. Co., 137 Mass. 210; Smith v. St. Paul etc. Ry. Co., 32 Minn. 1; 50 Am. Rep. 550. The principle of the omnibus case applies: See Brien v. Bennett, 8 Car. & P. 724. But one does not become a passenger on a street railway by merely running toward the motor-car, though with an intention of getting thereon, and attempting to board the car while it is in motion, especially where he has not been seen by the conductor until within a few feet of the car: Schepers v. Union Depot Ry. Co., 126 Mo. 665; Baltimore Traction Co. v. State, 72 Md. 409. If a person desires to enter a street-car, and signals the driver to stop, and the driver holds the car, the person signaling, the instant he places his foot upon the step of the car, is a passenger. The signal is an offer or request to ride, and its recognition by the person in charge of the car is an acceptance thereof: Ganiard v. Rochester City etc. R. R. Co., 50 Hun, 22; affirmed in 121 N. Y. 661. But the fact that the driver intends to stop in response to a signal, but does not do so, owing to a sudden deflection of the car, and which injures the plaintiff, does not create the relation of carrier and passenger: Donovan v. Hartford Street Ry. Co., 65 Conn. 201. One who attempts to board a moving street-car, without indicating his intention soon enough to enable the person in charge to stop the car at a proper place is not a passenger: Schepers v. Union Depot Ry. Co., 126 Mo. 665. Neither is a person a passenger who attempts to get on a street-car moving at the rate of six miles an hour: Baltimore Traction Co. v. State, 78 Md. 409. Compare Schaefer v. St. Louis etc. Ry. Co., 128 Mo. 64, 71.

If a person gets upon a street-car for the purpose of becoming a passenger, expecting and willing to pay fare, he becomes a passenger for hire, although the conductor, owing to the crowded condition of the car, may fail to collect fare from him: Cogswell v. West Street etc. Ry. Co., 5 Wash. 46. If one, although he has paid no fare, is on

a street-car, with the knowledge and permission of the person in charge of the car, he is a passenger, and is entitled to the same rights as if he had paid fare: *Muehlhausen v. St. Louis R. R. Co.*, 91 Mo. 332; *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130. The omission of the driver to demand or collect fare does not affect a boy's status as a passenger: *Buck v. People's etc. Co.*, 46 Mo. App. 555.

It is the duty of street railway companies to prevent children entering their cars except under proper safeguards, and they are answerable for their negligence whether the children are passengers or not: *Danbeck v. New Jersey Traction Co.*, 57 N. J. L. 463; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11; *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130; *Pittsburg etc. Ry. Co. v. Caldwell*, 74 Pa. St. 421; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37.

*Assistants of Passengers.*—The assistant of a passenger has been regarded as a passenger, under some circumstances. Thus, if the father of an invalid daughter has an agreement with a railroad company that its cars will stop long enough for him to put her aboard the cars, and to alight therefrom in safety, the relation of carrier and passenger exists between him and the company, while he is assisting her on the cars and departing therefrom: *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295; 51 Am. St. Rep. 303. But the soundness of such a doctrine may well be doubted. It is true, however, that a carrier, with notice, does owe some duty to those who assist sick or disabled passengers that require assistance, and that it is answerable for its negligence resulting in injury to such assistants, for they are not trespassers, and are entitled to at least ordinary care in being protected from injury: *Railway Co. v. Salzman*, 52 Ohio St. 558; 49 Am. St. Rep. 745; *Little Rock etc. Ry. Co. v. Lawton*, 55 Ark. 428; 29 Am. St. Rep. 48, and monographic note thereto on the duty of railway companies to a person assisting a passenger: *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443; *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371. For cases in which a recovery was denied, see *Central R. R. etc. Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505; *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Coleman v. Georgia R. R. etc. Co.*, 84 Ga. 1; *Griswold v. Chicago etc. Ry. Co.*, 64 Wis. 652. It is also true that a carrier must provide and maintain safe approaches to its stations and vehicles of transportation, and is answerable for injuries arising from its negligence in this respect, not only to passengers, but also to those who are on the premises for the purpose of assisting, welcoming, or bidding farewell to passengers: *Hamilton v. Texas etc. Ry. Co.*, 64 Tex. 251; 53 Am. Rep. 756; *York v. Canada etc. S. S. Co.*, 2 Can. 167; note to *Little Rock etc. Ry. Co. v. Lawton*, 29 Am. St. Rep. 55.

*Employés of Carrier.*—An employé of a carrier, traveling to or from his work, upon the carrier's vehicles of transportation, free of charge, as stipulated for in the contract of service, is not a passenger, but merely an employé: *Vick v. New York Cent. etc. R. R. Co.*, 95 N. Y. 267; 47 Am. Rep. 36; *McQueen v. Central Branch etc. R. R. Co.*, 30 Kan. 689; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83; *Tunney*



v. Midland Ry. Co., L. R. 1 Com. P. 291. See, also, Higgins v. Hannibal etc. R. R. Co., 36 Mo. 418; Gillshannon v. Stony Brook R. R. Corp., 10 Cush. 228; Seaver v. Boston etc. R. R., 14 Gray, 466; Russell v. Hudson River R. R. Co., 17 N. Y. 134; May v. Ontario etc. Ry. Co., 10 Ont. 70; Moss v. Johnson, 22 Ill. 633.

A yardmaster, after being relieved from duty, took a passenger-car and engine to give himself and fellow-servants a free ride to and from a meeting of theirs, without notice to, or permission from, any officer who had authority to permit the passage of such a train; and the company was held not to be answerable, as to a passenger, for an injury to one on the train, although the engineer was paid for the time spent in running the train as extra time. That fact was not a ratification by the company of the unauthorized acts of the yardmaster in using the train as a passenger train, where the payment was made by direction of the master mechanic, who had no authority in relation to the carrying of passengers: Chicago etc. Ry. Co. v. Bryant, 65 Fed. Rep. 969. So, where the deceased and other employes of the defendant railroad company had borrowed a car and engine for their own purposes, by permission of the defendant's yardmaster, and, in the negligent management thereof, the plaintiff's intestate was killed, it was held that the relation of carrier and passenger did not exist, and that the plaintiff could not recover: Davis v. Chicago etc. R. R. Co., 45 Fed. Rep. 543.

If a person is employed by a railroad company as a day laborer, and reports daily for service, and subject to call, but is allowed to attend to other business when not needed for the day, he occupies the position of a passenger, and not of an employe where he gets on a train for his own purposes when "off duty": McDaniel v. Highland Avenue etc. R. R. Co., 90 Ala. 64. So, if the conductor of private freight-cars, not in the employ of a railroad company, assists the conductor of the train, upon the latter's request, in cutting cars loose, he is a passenger after he resumes his proper place as a passenger, and is entitled to the protection which that relation gives him: Cumberland Valley R. R. Co. v. Myers, 55 Pa. St. 288. Compare O'Donnell v. Allegheny etc. R. R. Co., 59 Pa. St. 239; 98 Am. Dec. 336; Gillenwater v. Madison etc. R. R. Co., 5 Ind. 339; 61 Am. Dec. 101. A carrier that has employed a servant to work at a terminal point, and that has contracted to transport him to and from work, cannot, through its train officials, lawfully require him to vacate a seat assigned to and occupied by, him in a car, for the purpose of giving it to a passenger who has paid his fare: New York etc. R. R. Co. v. Burns, 51 N. J. L. 340. The relation which a person employed by a carrier bears to the carrier, as to whether he is a passenger or not, is a question which must, of course, be submitted to the jury where the testimony is conflicting: Texas etc. Ry. Co. v. Scott, 64 Tex. 549; Albion Lumber Co. v. De Nobra, 72 Fed. Rep. 739; Bryant v. Chicago etc. Ry. Co., 53 Fed. Rep. 997.

*Express Messengers.* —It seems to be well settled that an express messenger, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge is a passenger for hire, though he is carried in a

special car: *Voight v. Baltimore etc. Ry. Co.*, 79 Fed. Rep. 561; *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345; *Blair v. Erie Ry. Co.*, 66 N. Y. 313; 23 Am. Rep. 55; *Kenney v. New York etc. R. R. Co.*, 125 N. Y. 422; *Brewer v. New York etc. R. R. Co.*, 124 N. Y. 59; 21 Am. St. Rep. 647; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Fordyce v. Jackson*, 56 Ark. 594; *Chamberlain v. Milwaukee etc. R. R. Co.*, 11 Wis. 238; *Yeomans v. Contra Costa etc. Nav. Co.*, 44 Cal. 71; *Jennings v. Grand Trunk Ry. Co.*, 15 Ont. App. 477. If the express agent, however, take another person into the car with him for the purpose of teaching him the business, and the conductor, supposing him to be an agent of the express company, suffers him to ride without paying fare, such person is not a passenger: *Union Pac. Ry. Co. v. Nichols*, 8 Kan. 505; 12 Am. Rep. 475.

*Mail Agents or Postal Clerks.*—What is said above of express messengers applies to mail agents or postal clerks while traveling on a passenger train in the legitimate discharge of official duties. Their relation to the railroad company is analogous to that of express messengers, and they are accorded the same rights as passengers for hire. The rule therefore is, that a mail agent or postal clerk, riding on a railroad train in the discharge of his duties, under a contract between the government and the company, occupies the position of a passenger for hire with respect to the company's liability for its negligence: *Norfolk etc. R. R. Co. v. Shott*, 92 Va. 34; *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455; *Voight v. Baltimore etc. Ry. Co.*, 79 Fed. 561; *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345; *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550; *Magoffin v. Missouri Pac. Ry. Co.*, 102 Mo. 540; 22 Am. St. Rep. 798; *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75; *Hammond v. North Eastern R. R. Co.*, 6 S. C. 130; 24 Am. Rep. 467; *Baltimore etc. R. R. Co. v. State*, 72 Md. 36; 20 Am. St. Rep. 454; *Nolton v. Western R. R. Corp.*, 15 N. Y. 444; 69 Am. Dec. 623; *Libby v. Maine Cent. R. R. Co.*, 85 Me. 34; *Arrowsmith v. Nashville etc. R. R. Co.*, 57 Fed. Rep. 165; *Collett v. London etc. Ry. Co.*, 16 Q. B., N. S., 984; *Grant v. Raleigh R. R. Co.*, 108 N. C. 462; *Gleeson v. Virginia etc. R. R. Co.*, 140 U. S. 435; *Houston etc. Ry. Co. v. Hampton*, 64 Tex. 427; *Hale v. Grand Trunk R. R.*, 60 Vt. 605. *Contra, Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256; *Price v. Pennsylvania R. R. Co.*, 113 U. S. 218.

A mail agent lawfully on a railway train, and entitled to transportation, is to be regarded as essentially a passenger, and entitled to recover for an injury resulting from the negligence of the company or of its servants, whether the company is compensated for his transportation by the charge for the car, or for the transportation of the property of which he has charge, or receives no compensation whatever for his carriage: *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345. A United States railway postal clerk, entitled to ride free on trains while on duty, or going to or returning from duty, is a passenger entitled to protection as such while returning home and doing extra work in a postal-car handling mail, although he is not on his regular run and has not paid, nor offered to pay, fare or exhibited his commission, or notified the conductor of his



presence. In such case, he may recover for an injury inflicted by the negligence of the railroad company: *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550. If a railway company has continuously recognized the right of a United States postal clerk to free transportation on its trains, he has a right to assume that he will be carried free, and to enter the cars as is his custom without looking up the conductor and informing him of his presence and presenting his commission. It is the duty of the conductor to look the clerk up and demand to see his commission, or the payment of fare, if fare is claimed for his transportation: *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550. As to when a postal clerk is not guilty of contributory negligence, see *Baltimore etc. R. R. Co. v. State*, 72 Md. 36; 20 Am. St. Rep. 454.

*Other Persons.*—A child, on a railroad train, with its mother, who has a ticket for herself, is a passenger where no questions have been asked as to the age of the child, and there is no intention to defraud the company, although the child is old enough to require the payment of half-fare: *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442; but it is otherwise if the child is unaccompanied by one having it in charge: *Gulf etc. Ry. Co. v. Dawkins*, 77 Tex. 228. Slaves transported for hire were deemed passengers: *Mitchell v. Western etc. R. R.*, 30 Ga. 22; *McClenaghan v. Brock*, 5 Rich. 17. One riding in a private car may be considered a passenger, so far as concerns his right of recovery for personal injury occasioned by the negligence of the railroad company; as where the owner of a private car arranges to have it attached to a regular passenger train, and stipulates that he will attend to the brakes of his own car: *Lackawanna etc. R. R. Co. v. Chenewith*, 52 Pa. St. 382; 91 Am. Dec. 168.

With respect to persons following particular pursuits on railroad trains it has been held that a porter of a Pullman palace car occupies the position of a passenger in respect to the careful running and management of the train: *Jones v. St. Louis etc. Ry. Co.*, 125 Mo. 666; 46 Am. St. Rep. 514. Compare *Hughson v. Richmond etc. R. R. Co.*, 2 App. D. C. 98. A newsboy lawfully on a car is entitled to be carried safely, whether he is a passenger or not: *Blackmore v. Toronto Street Ry. Co.*, 38 U. C. Q. B. 172. One who has been employed by a railroad company, but who, in pursuit of his private business, takes passage on the cars of the company, is a passenger though no fare is collected from him: *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336. One injured in an express car of a passenger train, who is known to the conductor, and has not been asked to pay fare, although he has sufficient funds therefor, and who up to six weeks prior to the accident had been an express messenger on the same train, but at the time of the accident was engaged in other business not connected with the railway company, cannot be said to be seeking to obtain a ride without paying fare, nor of practicing a fraud on the conductor or the company by passing himself off as an express messenger. On the contrary, his legal status is that of a regular passenger: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17. If one has a contract with a railroad company to supply passengers on the trains with iced water, is permitted to sell popped



corn on the trains, and has a season ticket over the road issued to him, he is, while traveling under such contract, a passenger and not a servant of the corporation: *Commonwealth v. Vermont etc. R. R. Co.*, 108 Mass. 7; 11 Am. Rep. 301. So, if a carrier rents a room to a person for selling liquors and cigars, at a stipulated rent, and agrees to carry and board him as a part of the contract, he is not an employé, but a passenger: *Yeomans v. Contra Costa etc. Nav. Co.*, 44 Cal. 71. And where passage is one of the mutual terms of an arrangement for carrying poultry over a line of railway, the person so carrying it is a passenger for hire: *Delaware etc. R. R. Co. v. Ashley*, 67 Fed. Rep. 209.

On the other hand, it has been held that a newsboy on a train is not a passenger, but a mere licensee: *Duff v. Allegheny R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675; and a boy employed by a restaurant keeper to sell sandwiches and fruit on a railroad train, and who has a free pass over the road, is not a passenger while going in a baggage-car, for a private purpose, over a part of the road to which he is not called by his business: *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115.

*Riding on Certain Tickets.*—A round trip excursion ticket, not limited by its terms, is good until used, unless the purchaser was personally notified to the contrary at the time he bought it: *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. St. 142. But, while one may ride as a passenger upon an unlimited ticket until it is used, yet the carrier has the right to refuse to recognize, as a passenger, a person who insists upon riding on a limited ticket, after it has expired: *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158; 34 Am. St. Rep. 787; *Boston etc. R. R. Co. v. Proctor*, 1 Allen, 267; 79 Am. Dec. 729; *Lillis v. St. Louis etc. R. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Elmore v. Sands*, 54 N. Y. 512; 13 Am. Rep. 617; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Pennington v. Philadelphia etc. R. R. Co.*, 62 Md. 95; *Rawitzky v. Louisville etc. R. R. Co.*, 40 La. Ann. 47; *Hill v. Syracuse etc. R. R. Co.*, 63 N. Y. 101; *State v. Campbell*, 32 N. J. L. 309; *Gulf etc. Ry. Co. v. Henry*, 84 Tex. 678; *Shedd v. Troy etc. R. R. Co.*, 40 Vt. 88; *Heffron v. Detroit etc. Ry. Co.*, 92 Mich. 406; 31 Am. St. Rep. 601; *Howard v. Chicago etc. R. R. Co.*, 61 Miss. 194; *Powell v. Pittsburg etc. R. R. Co.*, 25 Ohio St. 70; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Farewell v. Grand Trunk Ry. Co.*, 15 U. C. C. P. 427; *Briggs v. Grand Trunk Ry. Co.*, 24 U. C. Q. B. 510.

A limitation on a railroad ticket that it shall be "good this day only," or "good for one passage on the day sold only," or "good for this day and train only," or "good this trip only," etc., is reasonable and valid: *Elmore v. Sands*, 54 N. Y. 512; 13 Am. Rep. 617; *State v. Campbell*, 32 N. J. L. 309; *Shedd v. Troy etc. R. R. Co.*, 40 Vt. 88; *Pier v. Finch*, 24 Barb. 514. Neither is there anything unreasonable in a requirement that a transfer ticket from one route of a street railway to another shall not be honored unless used within fifteen minutes after its delivery to the passenger, in the absence of any obligation on the part of the company, by charter, ordinance, or contract, to make such transfer and to carry the passenger over both

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routes for a single fare: *Heffron v. Detroit etc. Ry. Co.*, 92 Mich. 406; 31 Am. St. Rep. 601.

The fact that a passenger insisting upon riding on a limited ticket which has expired has, on other occasions, been allowed to ride on an expired ticket, or even upon the particular one in question, does not entitle him to transportation on such ticket: *Johnson v. Concord R. R. Corp.*, 46 N. H. 213; 88 Am. Dec. 199; *Sherman v. Chicago etc. R. R. Co.*, 40 Iowa, 45; *Hill v. Syracuse etc. R. R. Co.*, 63 N. Y. 101. But if the ticket has been extended by a duly authorized agent, the rule is otherwise: *Randall v. New Orleans etc. R. R. Co.*, 45 La. Ann. 778; *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858. A railway ticket is "used" where the holder enters upon the transit before midnight of the day of expiration. It is not required that the passage should be completed within the time during which the ticket is good: *Evans v. St. Louis etc. Ry. Co.*, 11 Mo. App. 463; *Lundy v. Central Pac. R. R. Co.*, 66 Cal. 191; 56 Am. Rep. 100; *Georgia etc. R. R. Co. v. Bigelow*, 68 Ga. 219. Compare *Auerbach v. New York etc. R. R. Co.*, 89 N. Y. 281; 42 Am. Rep. 290. If a ticket over connecting lines is limited to a specified number of days, the last day falling on Sunday, and the last line runs no train on that day, the passenger is entitled to passage on the next day: *Little Rock etc. Ry. Co. v. Dean*, 43 Ark. 529; 51 Am. Rep. 584. If one's ticket expires while he is "stopping off," and he refuses to pay fare when he gets on the train again, he is not a passenger: *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711. Nor can one having a ticket for a certain train get off at a way station, and afterward enter another train, without procuring another ticket or paying fare from the station at which he enters the cars: *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Breen v. Texas etc. R. R. Co.*, 50 Tex. 43; *Johnson v. Philadelphia etc. R. R. Co.*, 63 Md. 106; *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671.

The holder of a special excursion railway ticket for a round trip, surrendering it and receiving instead a regular ticket, substituted by the company for its own convenience, gets no right to return upon any other than the excursion train: *McRae v. Wilmington etc. R. R. Co.*, 88 N. C. 526; 43 Am. Rep. 745. But if one purchases a round-trip ticket, and the out-going conductor, by mistake, takes up the wrong end of it, the passenger is, nevertheless, entitled to transportation on the ticket left in his hands: *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309. Compare *Wightman v. Chicago etc. Ry. Co.*, 73 Wis. 169; 9 Am. St. Rep. 778, showing when a round-trip railroad ticket is good though the parts have become separated by accident. The rights of a passenger holding tickets over connecting lines are discussed in *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158; 34 Am. St. Rep. 787; *New York etc. Ry. Co. v. Bennett*, 50 Fed. Rep. 496; *Brooke v. Grand Trunk Ry. Co.*, 15 Mich. 332; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *St. Louis etc. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631.

One who travels upon, or attempts to travel upon, a nontransferable ticket issued to another person is not a passenger: *Way v. Chicago etc. R. R. Co.*, 64 Iowa, 48; 52 Am. Rep. 431; *Toledo etc. Ry.*

Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613; Langdon v. Howells, 4 Q. B. Div. 337; Cody v. Central Pac. R. R. Co., 4 Saw. 114; Drummond v. Southern Pac. Co., 7 Utah, 118; Crosby v. Maine Cent. R. R. Co., 69 Me. 418. Compare Post v. Chicago etc. R. R. Co., 14 Neb. 110; 45 Am. Rep. 100. Such an act is, according to the cases cited, a fraud upon the company. See *Fraud*, *infra*. But if a passenger on a railroad train, in good faith, and without an attempt to conceal his identity, presents for his passage a nontransferable commutation ticket issued to another, and his claim is recognized, and he is carried as a passenger, he is entitled to the right of a passenger to be carried safely, and to have a safe place to alight and leave the road: *Robostelli v. New York etc. R. R. Co.*, 33 Fed. Rep. 796.

An ordinary coupon ticket is transferable, although it was sold at a reduced rate, and has been partly used, unless prohibited by some condition on its face: *Nichols v. Southern Pac. Co.*, 23 Or. 123; 37 Am. St. Rep. 664. So, after a round-trip or excursion ticket has been used by the holder in going one way over the route, it is good, in the hands of a purchaser or transferee, and gives him a passenger's right to a return passage, subject to the prescribed limitation as to time, if there is no condition to the contrary: *Carsten v. Northern Pac. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589; *Hoffman v. Northern Pac. R. R. Co.*, 45 Minn. 53. See *Purchase of Tickets*, *supra*.

*Connecting Lines.*—A railroad company, receiving upon its track the cars of another company, assumes toward passengers coming upon its road in such cars, the relation of common carriers of passengers, and all liabilities incident to that relation: *Schopman v. Boston etc. R. R. Corp.*, 9 Cush. 24; 55 Am. Dec. 41. Compare *Jenkins v. Chicago etc. Ry. Co.*, 41 Wis. 112. A passenger who has been carried on the line of a railway in a passenger-car which that company switches off upon the line of a connecting railway, is, as to such connecting railway, a passenger during the time the car is stationary and he remains therein, if, in the usual course of business, that company presently receives the cars so delivered to it, couples them into trains, and carries them over its own line; and he is a passenger whether he, at the time of being injured, had procured a ticket or paid his fare for a passage over the connecting line or not: *Chattanooga etc. R. R. Co. v. Huggins*, 89 Ga. 494. On the other hand, if the yardmaster of a railroad, used exclusively for transporting coal and ore, and without authority from the officers of the company, permits an excursion train belonging to another company to go over the road, the persons on such trains are not passengers, but trespassers: *Vormus v. Tennessee etc. R. R. Co.*, 97 Ala. 326.

*Law and Fact.*—It is said in *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450, that the question whether one is a passenger or not "is one of mixed law and fact, but the law being tolerably clear, it may be said as a general rule that the issue upon any conflict of evidence is one for a jury to decide and not one to be passed upon as a matter of law, by the court": See, to the same effect, *Berry v. Missouri Pac. Ry. Co.*, 124 Mo. 223; *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St.



135; 2 Am. St. Rep. 542. Compare *Cross v. Kansas City etc. R. R. Co.*, 56 Mo. App. 664.

*Fraud.*—One conveyed by fraud, or against the express orders of the carrier, is not a passenger: *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245. If a person solicits and secures free transportation, or rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the company, and that in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights to recover for injury: *McVeety v. St. Paul etc. Ry. Co.*, 45 Minn. 268; 22 Am. St. Rep. 728; *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245.

The procurement of a railroad pass from an agent, by misrepresentations, is a fraud upon the company, which vitiates the contract of carriage, and the procurer is not a passenger while traveling upon it: *Brown v. Missouri etc. Ry.*, 64 Mo. 536. One who is injured by the negligence of a railway company while traveling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company: *Way v. Chicago etc. R. R. Co.*, 64 Iowa, 48; 52 Am. Rep. 431. One who fraudulently attempts to ride on a nontransferable pass issued to another person is not a passenger for hire: *Toledo etc. Ry. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613.

One who bribes a brakeman to permit him to ride on a freight-car is not a passenger, although the conductor, upon discovering him, locks him in the car prior to ejecting him: *Brevig v. Chicago etc. Ry. Co.*, 64 Minn. 168. One who knowingly and fraudulently induces the conductor to disregard his duty and to defraud the company out of the amount of his fare for his own profit cannot claim the rights of a passenger: *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245. Neither can one who, knowing that a train is not intended for the conveyance of ordinary passengers, such as an accommodation train, gives a "tip" or bribe to the conductor to induce him to allow such person to travel on the train contrary to the rules of the company. *Canadian Pac. Ry. Co. v. Johnson*, 6 Montreal Q. B. 213. One who contracts with a brakeman on a freight train, without the knowledge of the conductor, to pay fare, and gets into a box-car to take passage, is not a passenger: *Atchison etc. R. R. Co. v. Johnson*, 3 Oklahoma, 41. And one who gets on a freight train, upon the invitation of a brakeman, paying him less than the regular fare, is not a passenger, where such train is used exclusively for freight and is loaded with freight at the time: *Janny v. Great Northern Ry. Co.*, 63 Minn. 380. A child of the age at which the rules of a railroad company require the payment of a fare is not entitled to be carried as a passenger until its fare is paid, when demanded, and, if the mother fraudulently attempts to evade the payment of its fare, the child may be removed from the train: *Beckwith v. Cheshire R. R. Co.*, 143 Mass. 68.

*Ceasing to be a Passenger.*—The question as to when one ceases to be a passenger, while it is cognate to the subject under consideration, is not, strictly speaking, included within it, and we must, therefore, leave it untouched, as a satisfactory treatment of the numerous cases upon it would extend this note beyond its proper limits.

# MANUFACTURERS AND MERCHANTS' MUTUAL INSURANCE COMPANY v. ZEITINGER.

[168 ILLINOIS, 286.]

**INSURANCE—MISREPRESENTATION OF IMMATERIAL FACT—AGE OF BUILDING.**—A representation, although false, does not avoid a policy of fire insurance, where there has been no moral fraud, unless it is material to the risk. Hence, a misrepresentation as to the age of a mill insured does not avoid the policy where the representation is not material.

**INSURANCE—MATERIALITY OF REPRESENTATION—QUESTION FOR JURY.**—The materiality of a representation, in an application for fire insurance, is a question for the jury, upon the evidence, and its finding thereon, under proper instructions, will not be disturbed on appeal.

**INSURANCE—AGE OF BUILDING—IMMATERIAL EVIDENCE.**—An offer, in an action on a policy of fire insurance, to prove that the age of a building is material to the risk, is properly refused, where there is no proof, or offer of proof, that the risk has been changed or increased by a misrepresentation as to the age of the building.

**INSURANCE—RENDERING STATEMENT—PROOFS OF LOSS—MAIL.**—A requirement in a policy of fire insurance, that the insured within sixty days after the fire shall "render" a statement to the company, containing proofs of loss, is met by mailing the statement to the company within the time limited.

Assumpsit brought in the circuit court by Maria Zeiting, as executrix of the last will and testament of Valentine Anthony Zeiting, deceased, on an insurance policy, against the Manufacturers and Merchants' Insurance Company, to recover a loss sustained by a total destruction of the property insured by fire. The property insured was a mill and machinery, the policy to run for five years from August 10, 1893. In the application for insurance, the age of the mill was stated to be "about twenty to twenty-five years." The policy provided that it should be void, if the insured concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof. It also required the insured, within sixty days after the fire, to render a statement to the company, containing proofs of loss. The fire occurred on September 3, 1893, and notice of loss was mailed to the company the next day. On November 1, 1893, the agent of the insured mailed proofs of loss to the company, which were received by it on November 3d. The mill was originally built of stone, about 1828 or 1830; but it was practically rebuilt in 1867, and became, substantially, a new structure. The plaintiff obtained a judgment for two thousand three hundred and fifty dollars, and the defendant company appealed to the appellate court. That court affirmed the judgment and the insurance com-

pany appealed to the supreme court. The errors assigned were, that the court admitted improper evidence for the plaintiff, excluded proper evidence for the defendant, gave improper instructions and refused proper instructions. It was also alleged that the appellate court erred in holding that mailing proofs of loss within sixty days, without their receipt by the company within that time, was a compliance with the terms of the policy.

William Marshall and A. D. Early, for the appellant.

R. K. Welsh, J. C. Garver, and A. E. Fisher, for the appellee.

<sup>201</sup> CARTER, J. The chief grounds upon which appellant urges that this judgment should be reversed are, that the policy was rendered void by the alleged misrepresentation in the application as to the age of the mill; that the proofs of loss were not "rendered" within the sixty days, as provided in the policy, and that the condition in the policy as to such proofs was not waived by the company.

It is not claimed that there was any warranty as to the age of the mill, but that the representation as to such age was material, and was untrue. Some of the witnesses testified that the mill was practically rebuilt in 1867 and was substantially a new structure, and it must be so regarded upon the facts as found by the courts below. It was not shown that there was any material difference between the value of the mill after it had been so partially rebuilt in 1867, and what its value would have been had it been entirely rebuilt anew at that time. When there is no moral fraud, a representation, although false, does not avoid the policy unless such representation be material, and its materiality is a question, upon the evidence, for the jury. In this case, the jury were instructed as favorably for the defendant on this point as it could in reason have asked, and we cannot reverse the findings of fact below that the representation was not material: *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; 59 Am. Rep. 444. It is true that counsel for appellant offered to prove by experts, as a general proposition, that the age of a building <sup>202</sup> is material to the risk, and the offer was refused by the court. But there was no evidence of any change or increase in risk on account of the alleged age of this mill, nor any offer to show any such change or increase in risk, and the offer as made was properly refused.

It is also insisted by appellant that the proofs of loss were not rendered within the time limited. It is said that the clause in the policy, "shall render a statement to the company," means "shall render a statement to the company at its office"; that the word "render" has a different signification from "forward" or



"mail," and that the policy required the proofs to be actually delivered to the company at its home office within the sixty days. We think such an interpretation of this provision is too narrow and strained. In Webster's International Dictionary, the word "render," in the sense as it is here used, is defined: "To furnish; to state; to deliver, as, to render an account; to render judgment." It is a familiar rule that all conditions in an insurance policy are to be construed most strongly against the insurer. There is no dispute that the first proofs of loss were mailed before the expiration of the sixty days, and we think that was a substantial compliance with the requirements of the policy. We have examined the cases cited by appellant, but find nothing in them requiring us to hold differently. This also disposes of the question of waiver.

Objection is made to the admission in evidence of some letters on behalf of appellee, but, under the view just expressed, we think no injury was done to appellant, especially as any improper effect of such letters was specially guarded against by an appropriate instruction.

We think the jury were properly instructed—certainly as favorably to appellant as it could reasonably have asked.

Perceiving no error in the record the judgment is affirmed.

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**INSURANCE—IMMATERIAL MISREPRESENTATION.**—Mere mistakes in stating facts, which do not, in themselves, annul the conditions of a policy of insurance, and do not appear to be willful misrepresentations, will not defeat an action upon the policy: *Jones v. Mechanics' Fire Ins. Co.*, 36 N. J. L. 29; 13 Am. Rep. 405. For illustrations of statements which are immaterial, see monographic note to *Fowler v. Aetna etc. Ins. Co.*, 16 Am. Dec. 466, on misdescription of insured property. See, also, *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474; 59 Am. Rep. 810, and extended note. The materiality of a fact, in such cases, is a question for the jury: Note to *Burritt v. Saratoga etc. Ins. Co.*, 40 Am. Dec. 351; *Farmers' Ins. etc. Co. v. Snyder*, 16 Wend. 481; 30 Am. Dec. 118.

**INSURANCE—NOTICE AND PROOF OF LOSS BY MAIL.**—Evidence that notice and proof of loss were mailed, properly addressed, to the insurer, raises the presumption that they were duly received by him: Note to *Whitmore v. Dwelling House Ins. Co.*, 33 Am. St. Rep. 842.

**GERMANIA LIFE INSURANCE COMPANY v. KOEHLER.**

[168 ILLINOIS, 293.]

**INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE.**—A policy of life insurance, providing that it shall be null and void if a condition therein in regard to residence is violated, is not absolutely void upon the happening of such event, but merely voidable, at the election of the company.

**INSURANCE—LIFE—BREACH OF CONDITION—RECEIPT OF PREMIUMS—DUTY OF AGENT.**—It is the duty of a local insurance agent, after he has knowledge of the violation of a condition, in a life insurance policy, regarding residence, and for which a forfeiture may be declared, to ascertain from the company, before he receives a premium after such breach, whether or not a forfeiture is to be enforced.

**INSURANCE—LIFE—CONDITIONS—WAIVER.**—The insurer can waive conditions that are for his benefit, such as one in a life insurance policy, respecting residence.

**INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE—NOTICE TO AGENT AS NOTICE TO COMPANY.** If a local insurance agent, having power to receive premiums, receives a premium on a policy of life insurance after he has notice of the violation of a condition therein respecting residence, and which renders the policy voidable at the company's election, his knowledge is notice to the company of the fact of such residence.

**INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE—WAIVER BY COMPANY—PREMIUMS.**—If one holding a policy of life insurance violates a condition therein respecting residence, under penalty of a forfeiture, and a local agent, empowered to recover premiums, receives a premium from him after knowledge of the breach of condition, the transmission of the premium to the company, and the retention thereof by it, operates as a waiver by the company of the breach.

**INSURANCE—LIFE—BREACH OF CONDITION—WAIVER—PROOF OF.**—A condition in writing, in a policy of life insurance, may be waived by parol, and such waiver may be inferred from the acts and declarations of the company.

Assumpsit upon a policy of life insurance, issued on March 21, 1866, upon the life of Jacob Kaysing, at that time the husband of the appellee, Elizabeth Koehler. The policy was payable to Elizabeth Kaysing, then the wife of Jacob Kaysing. After Kaysing's death, his widow, Elizabeth Kaysing, married a man by the name of Koehler. The policy declared that it was accepted under the express condition that the same should cease and be null, void, and of no effect, and that the company should not be liable for the payment of the sum insured, or any part thereof, and that all premiums previously paid should be the absolute property of the company, without any account whatever to be rendered therefor, if the person upon whose life the insurance was taken should, between July 1st and November 1st, visit the limits of the United States lying south of the southern boundaries of Virginia, Kentucky, Missouri, and Kansas, without having

previously obtained and had indorsed upon the policy the consent of the company for any such visit, residence, etc. At the bottom of the policy was written the following: "General agents, holding an appointment from the company, are authorized to receive premiums at or before the day when due upon the receipt of the president or secretary of the company, but not to make, alter, or discharge contracts or waive forfeitures." Defendant's second plea set up that Jacob Kaysing did, between July, 1875, and November, 1875, and July 1, 1876, and November 1, 1876, visit and reside in the state of Texas, south of the southern boundaries of the states above named, and that he died in the state of Texas, in September, 1876; but the replication to this plea averred that, from March 21, 1874, to the time of his death, Jacob Kaysing resided in Texas; that during such residence, the plaintiff, by her agent, informed the defendant company of such residence in Texas; that the company did not object, nor intimate that the condition of the policy sued on was violated for that reason; that the plaintiff, believing that a forfeiture of the condition was waived by the company, paid the semi-annual premiums due on March 21, 1874, September 21, 1874, and March 21, 1875; that when such payments were made, the company was informed and had knowledge of such residence in Texas, made no objection thereto, received the premiums so paid, and delivered its receipts therefor to the plaintiff. A large number of receipts for premiums paid, beginning with September 21, 1866, were introduced in evidence on the trial. They were all made out in the same form and upon the same kind of blank. All of the receipts, including those made on September 21, 1874, March 21, 1875, and September 21, 1875, were dated at Belleville, Illinois, where the policy was issued. They were signed by C. Doremus, secretary, and countersigned by George Vanderschmidt, agent. Each receipt had printed at the foot of it the following words, to wit: "Agents, holding an appointment from the company, are authorized to receive premiums at or before the time when due upon the receipt of the president or secretary of the company, but not to make, alter, or discharge contracts or waive forfeitures. This receipt is not valid until countersigned by the agent of the company." The appellant was a foreign insurance company, located at New York, and there was introduced in evidence a certificate signed by the auditor of public accounts of the state of Illinois, dated March 12, 1874, certifying that there had been filed in his office a sworn statement showing the condition of the company, and also certifying that George Vanderschmidt of Belleville, having been appointed by the proper officers of the



company, was its authorized agent for the state of Illinois until March 1, 1876. Upon payment of the last premium, made on September 21, 1875, the company's agent announced to the plaintiff's agent that the policy was fully paid up. Kaysing and his wife, in May, 1873, borrowed some money from one George Mueller, and assigned the policy to him as collateral security. Solomon Mueller, the brother of George, sometimes acted for his brother, and for Elizabeth Koehler, the appellee, in making payments of the premiums to the agent at Belleville, while the Kaysings were residing in Texas. The plaintiff obtained a judgment in the circuit court which was affirmed in the appellate court, and this appeal was prosecuted from such judgment of affirmance.

George C. Rebhan, Turner & Holder, and Frederick H. Bacon, for the appellant.

William Winkelmann, for the appellee.

**297** MAGRUDER, J. Among the errors assigned by the appellant, those mainly relied upon are the giving of the first and second instructions which the trial court gave for the plaintiff, and the refusal of the second instruction which the court was asked to give on behalf of the defendant below. The **298** giving and refusal of these instructions raise the question whether, under the facts of this case, there was a waiver by the appellant company of the condition in the policy forbidding the insured to visit or reside in the state of Texas at any time during any year from July 1st to November 1st. It is claimed by the appellee that there was such waiver, while the appellant contends that, if anything in the evidence tends to show a waiver, it was a waiver by an agent of the company who had no authority to make the same, and therefore was not binding upon the company.

The evidence shows substantially the following facts in regard to the payments of the last three premiums upon the policy: Solomon Mueller went to Vanderschmidt, the agent, in September, 1874, to pay the premium due on the twenty-first day of that month, and at that time told Vanderschmidt that Kaysing was in the south; Vanderschmidt said that was all right; he received the premium at that time paid to him by Solomon Mueller, and delivered to Mueller a receipt, signed by Doremus as secretary, and countersigned by Vanderschmidt as agent; in March, 1875, Solomon Mueller again went to Vanderschmidt, and paid him the premium due upon the twenty-first day of that month, which was accepted, and a similar receipt to that last above

named was executed and delivered to Mueller, as the agent of George Mueller and the Kaysings; at that time Vanderschmidt asked Mueller where Jacob Kaysing was, and Mueller replied that he was down in Texas; Vanderschmidt then said, "It will not make any difference where he is"; in September, 1875, Mueller again went to Vanderschmidt, and paid him the semi-annual premium due on the twenty-first day of that month; after he had paid him Vanderschmidt spoke up, and said: "Is he down there yet?" Mueller said, "Yes, he is down there yet in Texas"; Vanderschmidt said, "Mueller, you have a paid-up policy, you have no more to pay now."

<sup>299</sup> The defense made by the company is, that the authority of Vanderschmidt, as agent, was a circumscribed and limited authority; that he was only authorized to receive premiums, and not to make, alter, or discharge contracts or waive forfeitures; that he therefore had no power to waive the breach of the condition in regard to residence in Texas; that the terms of the limited authority possessed by the agent were in writing, and were attached to the policy, and also to the premium receipts, and that thereby the insured had notice of the limited nature of the agent's authority; that the insured was not protected by anything said by the agent of the company, inasmuch as the insured did not previously obtain and have indorsed upon the policy the consent of the company to such residence in Texas. We are unable to agree with the contention thus made on behalf of the appellant.

The appellant was a foreign insurance company. It had an agent, named Vanderschmidt, in Belleville, Illinois, who was authorized by the state auditor to transact business for it according to law in Illinois. The testimony shows that this agent had authority to receive applications for insurance, deliver policies, receive premiums, and countersign receipts for premiums paid to the company. It is claimed that, because his authority was limited to the receipt of premiums, it did not include the right to alter or change the contract, or waive a forfeiture or breach of condition. The appellee does not insist, and the instructions do not assert, that the waiver of the breach of the condition, which forbade the insured to reside in Texas within the specified months, was made by the agent at Belleville, but that it was made by the company itself. The evidence shows clearly that the agent at Belleville had notice that the insured was residing in Texas. This notice to its agent was notice to the company of

the fact of such residence. It is true that the rule which imputes to the principal the knowledge possessed by the agent applies only to cases where <sup>300</sup> the knowledge is possessed by an agent within the scope of whose authority the subject matter lies. In other words, notice to an agent, which is held to be notice to the principal, must be notice of such facts as are connected with the business in which the agent is employed: *Mullanpay Savings Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401. Here, when Vanderschmidt received notice of the residence of the insured in Texas, he received notice of a fact which was connected with his business. He had authority to receive premiums "at or before the time when due upon the receipt of the president or secretary of the company." It was his duty, therefore, before receiving such payments of premiums, to determine whether they were due to the company or not. The policy provides upon its face that it shall be null and void if the condition in regard to residence is violated. In *Manufacturers etc. Ins. Co. v. Armstrong*, 145 Ill. 469, we held that a provision in a policy of insurance, to the effect that it should become void in a certain event, will not render the policy absolutely void upon the happening of such event. It cannot, therefore, be said that the taking up of his residence in Texas by Kaysing within the forbidden time, without the consent of the company indorsed upon the policy, made the policy absolutely void. But it entitled the company, and the company had the right, to declare it void for such breach of the condition. So long as it was yet undetermined whether the company would declare the policy forfeited for the breach of the condition or not, it was not certain that the premium was actually due, and, therefore, it was not certain that the agent had any right to receive the premium. It was, consequently, the duty of the agent to communicate with the company, as soon as he had notice of the violation of the condition, and ascertain from the company whether or not a forfeiture was to be enforced. His own duty in regard to the receipt of the premium depended upon the action of the company in regard to the forfeiture. Therefore, <sup>301</sup> the notice, which he received of the residence of the insured in Texas, was notice of a fact which was directly connected with the business, in which he was engaged, of receiving premiums for the company. Moreover, the policy provided, not only that it would be null and void in case of such a forbidden residence without the consent of the company, but it also provided that "all premiums previously paid shall be the absolute property of the company without any ac-



count whatever to be rendered therefor." It will thus be noticed that it was only the premiums previously paid, that is to say, paid before the breach of the condition, which were to become the absolute property of the company. The breach of the condition did not authorize the company to retain the premiums paid after the breach, if there was an intention to declare a forfeiture on account of the breach. The agent had knowledge of the conditions of the policy, and of the terms of his authority as embraced in the receipt. He therefore knew that the company had no right to keep, as its absolute property, premiums paid after the breach of the condition, if it intended to declare a forfeiture by reason of the breach of the condition. Here, the evidence shows that the agent received three semi-annual premiums after he had notice that the deceased was residing in the state of Texas. These premiums were forwarded to the company, and the company, which was affected with notice of the breach by reason of the notice to its agent, received the premiums, and forwarded to its agent in Illinois a receipt signed by its secretary in New York. By receiving the premium in New York, and by forwarding a written receipt therefor, after notice to its agent that there was a breach of the condition, the company itself is chargeable with a waiver of the condition. It is not necessary to hold that the waiver was that of the agent in Illinois, but, in view of the facts stated, it was a waiver by the company itself.

<sup>302</sup> It is well settled that such conditions as are here under consideration are for the benefit of the insurer, and therefore the insurer can waive them: *Phenix Ins. Co. v. Hart*, 149 Ill. 513, and cases therein referred to.

It is said, however, by counsel for appellant that it was the duty of the insured to inform the company at its office in New York of his residence in Texas, or to request the Illinois agent to give such notice to the company. We think that, under the circumstances, it was the duty of Vanderschmidt, the agent, to give notice to the company in New York of the information he had acquired from Mueller of the residence of the insured in Texas. When the insured pays the premium, and the agent receives it with the understanding on the part of the insured that the policy is to be considered valid and subsisting, then it is the duty of the agent, having the power to receive premiums, and not the duty of the insured, "to communicate to the home office the circumstances under which these premiums had been paid, and the representations, terms, and conditions under which they were paid; the insurers must be deemed to have constructive no-

tice of the change of residence, and, upon the payment and receipt of the premiums by them, they become as much bound as if the premiums had been paid directly at the home office, and had been received there with a full knowledge of a change of residence of the insured: 1 May on Insurance, sec. 136; 11 Am. & Eng. Ency. of Law, 338, 339; 2 Biddle on Insurance, 1074. In *Wing v. Harvey*, 5 De Gex, M. & G. 265, it was held that "a local agent, empowered to receive premiums, possesses the right to waive a change of residence beyond the permitted lines; because the insured is assumed to have only paid the premium to him with the understanding that the policy would be kept up, and that the knowledge imparted to the agent should have been imparted to his principal." Many of the cases in New York, urged by the appellant upon our consideration as holding, where <sup>303</sup> a policy of insurance contains a provision that no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of the policy, unless such waiver shall be in writing and indorsed on the policy, that a waiver will not be binding, unless made and indorsed as required by the policy, were referred to in *Manufacturers etc. Ins. Co. v. Armstrong*, 145 Ill. 469; and this court there refused to adopt the doctrine laid down in these cases.

The insured in the case at bar, when he communicated through his representative at Belleville to the company's agent there the fact of his residence in Texas, had a right to presume that such agent of the company would communicate the information so given to him to the company in New York. The presumption is, that the agent in such case does his duty as required by law. Under the circumstances, the deceased had a right to rely upon this presumption. In *Insurance Co. v. Wolff*, 95 U. S. 326, Mr. Justice Field said: "It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived." The latter case might seem at first blush to be opposed to the views here expressed, but a careful examination of its facts shows that such opposition does not really exist. There, the proof tended to show that the agent was not apprised of the fact that the insured had gone into forbidden territory, and, as soon as the company had ascertained that fact, it directed a return of the premiums paid after the forfeiture. Here, the agent was fully informed at three

different times of the residence in Texas. Here, also, it appears that there was not any return of the premiums, received by the company after the breach of the condition; nor was any forfeiture declared, until after the <sup>304</sup> death of the insured, and the presentation to the company of the proofs of his death.

The questions here considered are not new in this court. In *Phenix Ins. Co. v. Hart*, 149 Ill. 513, a fire insurance policy contained an agreement that, "if the property should hereafter become mortgaged or encumbered . . . . without consent indorsed hereon, . . . . this policy shall be null and void." It also contained this further clause: "No agent or employé of this company, or any other person or persons, have power or authority to waive or alter any of the conditions or terms of this policy except only the general agent at Chicago, Illinois, and any waiver or alteration by him must be in writing." It there appeared that one Upham was the local agent of the company at Jacksonville, and that the insured informed such local agent of his execution of a mortgage upon a certain portion of the property; the local agent stated to him that it was all right, and that there need be no consent of the company indorsed on the policy, allowing said mortgage; it was there held that the insurance company, with knowledge of the mortgage, could not retain the premium, and treat the policy as in force, knowing that the insured was relying upon its validity, until a loss was incurred, and then insist upon the execution of the mortgage as a breach of the condition of the policy. It was also held in the case last referred to that notice to the local agent of the breach of the condition was notice to the company, as the agent was clothed with apparent authority to transact the business of the company, and contract for it in respect to insurance; and that, independently of the question whether the local agent was authorized to waive the indorsement of consent on the policy or not, the company, being chargeable with notice of the fact that the insured was relying upon the policy as a valid insurance, and having failed to exercise its right of forfeiture until a cause of action accrued upon the policy, must be held to have waived the necessity <sup>305</sup> of such indorsement of consent. In the case at bar, the insured knew that the receipts for the premiums were forwarded to New York to be there signed by the secretary of the company; and he had a right to presume that, when the agent forwarded the premium and received back a receipt therefor, he had fully informed the company of the breach of the condition, and that it had consented to a waiver thereof. Although the condition is in writing, the waiver may be by parol, or may be inferred from the acts and declarations of



the company: Manufacturers etc. Ins. Co. v. Armstrong, 145 Ill. 469.

Whether the evidence in this case was sufficient to overcome the presumption that the Illinois agent did his duty and gave notice to the home office or not was a question of fact for the jury, and, so far as we are concerned, is settled by the judgments of the lower courts. Vanderschmidt, the agent, who received and forwarded the premiums, is dead, and has not testified in this case. The testimony of Doremus, the secretary, who signed the receipts in New York, has not been taken. There is in the record the evidence of an assistant secretary of the company, living in New York, who had charge of the books of the company, that the company never received any notice from its agent in Illinois of the residence of the deceased in Texas until after his death. The means of knowledge of this witness upon the subject were not the best. In an instruction, given for the defendant below, the court told the jury that, if they believed from the evidence, that the insured went into Texas during the forbidden time without having the written permission of the defendant indorsed upon the policy, and died there during said time, the plaintiff could not recover, unless the jury believed from the evidence that the condition was knowingly waived by the defendant. The jury have found that it was knowingly waived.

If it were true that the company was not bound by the constructive notice, given to its agent in a foreign <sup>306</sup> state, and could claim, in case of the death of the insured party, that its local agent had not given it actual notice of the breach of the condition, and thereby avoid the payment of the amount due upon the policy, then the door would be opened for frauds to be perpetrated by collusion between the companies and such foreign agents. In such cases, the failure of the agent to give such notice to the company would be a fraud as well upon the insured as upon the company. The principal "is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of any such misconduct": Story on Agency, secs. 140, 452. Such conduct on the part of the agent in a foreign state, in such a matter of insurance as is here presented, would present a case for the application of the well-recognized principle, that where one of two persons must suffer loss by reason of the fraud of an unfaithful agent, it

must be the company, and not the innocent assured: *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647. In *Haight v. Continental Ins. Co.*, 92 N. Y. 51, where an agent knowingly issued a policy on a vacant house, and charged a premium usual for such risk, which the company accepted, and did not offer to return, it was held that the company must have intended to make a valid contract, or else to perpetrate a fraud, and the provisions of the policy, declaring that it shall be void, if the house become unoccupied without the consent of the company, and that no agent has power to waive or modify any of the printed conditions of the policy, were deemed to have been waived.

In *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, a life insurance policy contained a provision that the insured should not be connected in any way with the ale, wine, or liquor business unless so specified in the application, <sup>307</sup> or unless permission was given by permit signed by the president or secretary; and it was held that the fact that the insured was at the time of the application in the liquor business did not prevent the policy taking effect; the policy also contained a provision that agents were not authorized "to make, alter, or discharge contracts or waive forfeitures," and it was held that, while an agent may not have power to waive a forfeiture, yet when knowledge of a ground of forfeiture came to an agent while in the discharge of his duties as agent, the knowledge of the agent was the knowledge of the company, and that the receipt of premiums after that time by the company became a waiver on its part of the forfeiture. It was also held in the latter case that an agent, whose business it is to receive applications for insurance, to deliver policies, and collect premiums within a certain territory, is an agent, whose knowledge of a cause of forfeiture becomes the knowledge of the company.

In *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, which was an action upon a life insurance policy against the present appellant, it appeared that the plaintiff knew that it was necessary to obtain the assent of the company to the residence of the insured in Mississippi, and that the agent had no power to modify or change the contract, as the policy stated that the agent had no such power, but it was held that, inasmuch as the agent received the premiums with the understanding between himself and the insured that the policy was to be binding on the company, and inasmuch as the agent was the agent of the company to receive premiums, it was the duty of such agent to have informed the company of what had transpired between the assured and himself. It was there held that the power to receive premiums was expressly given

the agent by the terms of the policy, and that, if he received them after the act of removal had worked a forfeiture, the company had no right to receive the money, and no right to insist upon a forfeiture while retaining <sup>308</sup> the premiums; that the company must either disclaim the act of the agent by returning the money thus improperly paid, or comply with the terms of the policy. The case of *Wing v. Harvey*, 5 De Gex, M. & G. 265, is referred to in the Kentucky case, and there approved of: *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Peoria etc. Ins. Co. v. Hall*, 12 Mich. 202; *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Hayward v. National Ins. Co.*, 52 Mo. 181; 14 Am. Rep. 400; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479.

It is claimed that the first instruction given by the plaintiff was erroneous, because it states that it was the agent's duty to communicate the violation of the condition to its home office in New York "and the terms and conditions under which such . . . payments had been made." The objection to this instruction is its alleged assumption that the payments were made upon terms and conditions. While the language may be deserving of criticism, yet the fact was undisputed that the agent in Illinois was informed of the residence of the insured in Texas at the time of the payments, and assurance was given to the representative of the insured that the fact of such residence made no difference. It is a fair inference from this testimony that the premiums were paid upon the condition that residence in Texas would make no difference, so far as the validity and binding force of the policy were concerned. It was proper to submit to the jury the question whether or not the payments were made because of the assurance given by the local agent that the insured might rely upon the policy as still subsisting and unaffected by the breach.

After a careful consideration of all the questions involved, we are of the opinion that no error was committed by the courts below for any of the reasons here urged upon our consideration. The judgments of the appellate court and of the circuit court are therefore affirmed.

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**INSURANCE—BREACH OF CONDITION—RESTRICTED DISTRICT—WAIVER.**—Notice to an insurance agent, who issues a policy, of facts relating to the subject matter of the insurance is notice to the company: *Rochester etc. Co. v. Liberty etc. Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745. Notice to an agent of any fact connected with the business in which he is employed is notice to the principal: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401. Conditions in the policy intended for the benefit of the company



may be waived by it: *Nebraska etc. Ins. Co. v. Christensen*, 29 Neb. 572; 26 Am. St. Rep. 407; and a condition in the policy may be waived by parol: *Notes to McFarland v. Kittanning Ins. Co.*, 19 Am. St. Rep. 726; *Phenix Ins. Co. v. Bowdre*, 19 Am. St. Rep. 333; *Berry v. American Cent. Ins. Co.*, 28 Am. St. Rep. 555. Knowingly accepting a premium for a policy under conditions which render it invalid is a waiver of the right to insist upon a forfeiture: *Note to Phenix Ins. Co. v. Tomlinson*, 21 Am. St. Rep. 211. The receipt of the premium on a policy of life insurance by an authorized agent of the company is a waiver, binding on the company, of a forfeiture for the violation of a condition against residing in a restricted district where such violation is known to the agent at the time of the receipt of the premium: *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664. Issuing or continuing a policy of insurance with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition: *Manchester Fire etc. Co. v. Glenn*, 13 Ind. App. 365; 55 Am. St. Rep. 225.

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## CRICKELAIR v. CITIZENS' INSURANCE COMPANY.

[168 ILLINOIS, 309.]

**INSURANCE—CHATTEL MORTGAGE—VOID POLICY.**—If a policy of fire insurance contains a stipulation that it shall be void if the property, at the time of the execution of the policy, is covered by a chattel mortgage, there can be no recovery on the policy where the property is so encumbered, if there has been no waiver or estoppel by which the company is precluded from relying on the contract.

Action upon an insurance policy, covering a stock of goods belonging to Crickelair and others, and which was, at the time of the insurance, covered by a chattel mortgage. No written application for insurance was made by the insured, no questions as to encumbrances were asked, and the insured did not disclose the fact that the property was mortgaged, nor did the appellee company have any knowledge of the existence of the encumbrance, although the mortgage appeared of record. The policy, however, contained a stipulation as stated in the opinion. The property was destroyed by fire within the period of time covered by the policy, and the company sent to the appellants, by mail, the amount paid as premium on the policy, but they immediately returned it by mail. This was an appeal from the judgment of the appellate court affirming a judgment of the circuit court, rendered against the plaintiffs, Crickelair and others, for costs.

Bulkley, Gray & More, for the appellants.

Bates & Harding, for the appellee.

**310 BOGGS, J.** By the stipulation in the policy, the terms of which are plain, direct, and unambiguous, the parties hereto

agreed that if the insured property, at the time the insurance was effected, was encumbered by chattel mortgage, the indemnity should not attach, but the policy should be void. This was the contract of the parties deliberately made, and the only question presented is, whether they are bound by it. They were competent to enter into the stipulation, no rule of law was contravened by it, and there is no ground apparent to us upon which to base a claim of either estoppel or waiver.

The law declared by the greater weight of authority is, that where a policy contains a stipulation such as the one in the case at bar, and the property be, at the time of the execution of the policy, covered by a mortgage, no recovery can be had unless it appears that there was a waiver or estoppel by which the company is precluded <sup>311</sup> from relying on the contract. It was so expressly ruled in *Wilcox v. Continental Ins. Co.*, 85 Wis. 193; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; 55 Am. Dec. 546; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431. The principle upon which these decisions rest was recognized and applied by this court in *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158, 11 Am. Rep. 54, and *Hebner v. Palatine Ins. Co.*, 157 Ill. 144.

The judgment of the appellate court is affirmed.

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**INSURANCE—CHATTEL MORTGAGE—VOID POLICY.**—An encumbrance, such as a chattel mortgage, put upon insured personal property, in violation of the terms of the policy of insurance, suspends and avoids it, although such encumbrance is paid off before the loss occurs: *German etc. Ins. Co. v. Humphrey*, 62 Ark. 349; 54 Am. St. Rep. 297.

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## IAGO v. IAGO.

[168 ILLINOIS, 339.]

**APPEAL—WRIT OF ERROR BY NEXT FRIEND OF INSANE DEFENDANT.**—An insane person may, by his next friend, maintain a writ of error for the purpose of questioning the regularity and legality of a decree of divorce entered against him in a proceeding instituted after he became insane.

**APPEAL.—A WRIT OF ERROR** is a new suit, yet, when brought to review a decree of divorce, it is but a step in defense of the relief sought to be obtained by the complainant in the original bill.

**APPEAL—WRIT OF ERROR—INSANE DEFENDANT—NEXT FRIEND—GUARDIAN AD LITEM.**—It is not essential that the same person who represented an insane defendant, in a suit against him for divorce, as guardian ad litem, should appear as his next friend in a writ of error to reverse the decree, because the court has power to appoint or to accept another person to act in that capacity.

Writ of error brought by Annie Brock, as next friend of Bernard Iago, an insane defendant, to reverse a decree of divorce entered in the circuit court against him and in favor of his wife, Selina Iago, the defendant in error. A bill having been filed in the circuit court by the wife, it appeared that Bernard Iago was insane, and a guardian ad litem, one H. T. Aspern, was appointed for him. The writ to reverse the decree was sued out in the appellate court, but was dismissed on motion, and the defendant appealed.

Haley & O'Donnell, for the appellant.

F. A. Dennison and J. E. White, for the appellee.

**341** BOGGS, J. The ground of the motion to dismiss was, that the plaintiff in error was an insane person at the time the writ of error was sued out, and by reason of such insanity was incapable to elect whether he will remain married or become single, and no one can elect for him.

It seems well settled the right to sue for an absolute divorce is a personal right and requires the intelligent action of the injured party, for which reason it has been frequently held a guardian or next friend of an insane person cannot maintain a suit for absolute divorce for his ward. It is also well settled in this state a writ of error is a new suit. The reasoning of the appellate court is, that an insane person, being incapable in law of instituting and maintaining a bill for divorce, is likewise incapable of maintaining a writ of error for the purpose of questioning the regularity and legality of a decree of divorce entered against him in a proceeding instituted after he became insane. We are unable to assent to this view. Actions for divorce may be instituted against insane defendants for a cause of divorce committed before the period of insanity. When such an action is begun, a court of equity, in view of the peculiar duty of such courts to protect the personal and property rights **342** of lunatics, will appoint some discreet and proper person to conduct the defense. The power possessed by courts of equity to provide that such defense shall be made is not exhausted by the appointment of a conservator ad litem or next friend to defend in the trial court, but may be exercised in courts of review, and further defense of the action for divorce prosecuted by any remedy provided by law whereby reversal of a decree of the trial court may be obtained. A writ of error is a new suit, but, at the same time, when brought to review a decree for divorce, is but a step in defense of the relief sought to be obtained by the complainant in the original bill.

In *Bradford v. Abend*, 89 Ill. 78, 31 Am. Rep. 67, a bill in



chancery filed by the conservator of an insane wife to set aside a decree of divorce was entertained by the circuit court, and its decree vacating a decree of divorce was affirmed by this court. It is true that in that case the bill for divorce was filed in the name of the wife while she was insane, and that the principle that an insane person cannot maintain a bill for divorce was applied by this court in support of the decree of the circuit court in vacating the decree for divorce. But it is further true that the insane wife was equally as incapable of electing whether she would remain married or single as was the plaintiff in error in the case at bar, yet the aid of the court against the decree of divorce was fully recognized and enforced. In the case cited, the ground of attack upon the decree could not be availed of in a writ of error, and for that reason resort was had to an original proceeding in the trial court. Had such ground been apparent from an inspection of the record, no reason is perceived why the relief might not have been had through the medium of such writ. Though an insane person may be incapacitated from maintaining an action for divorce, still it by no means logically follows no legal remedy can be availed of to remove a decree of divorce entered against the person so unfortunately afflicted.

<sup>343</sup> It is not essential the same person who represented the insane party as guardian ad litem in the circuit court should appear as next friend in a writ of error: *Ames v. Ames*, 148 Ill. 321. True, as suggested, the insane person has not capacity to consent to a change of the representative, but it is within the power of the court to appoint or accept another person to act in that capacity: Rev. Stats., sec. 13, c. 86, "Lunatics."

We think no sufficient reason appeared for dismissing the writ. The judgment of the appellate court is therefore reversed and the cause remanded to that court, with directions to overrule the motion.

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A WRIT OF ERROR is in the nature of a new action: See monographic note to *Wheeler v. Winn*, 91 Am. Dec. 195, on writ of error.

## GRAND LODGE INDEPENDENT ORDER OF MUTUAL AID v. WIETING.

[168 ILLINOIS, 408.]

**EVIDENCE.—POST MORTEM INQUISITIONS** made under the authority of the coroner are admissible in evidence.

**WITNESSES—EXPERTS—HYPOTHETICAL QUESTIONS.** One who seeks the opinion of an expert may, within reasonable limits, put his case hypothetically, as he claims it to have been proved, and take the opinion of the witness thereon, leaving the jury to determine whether the case as put is the one proved.

**INSTRUCTIONS — HYPOTHETICAL QUESTIONS.**—It is proper to instruct a jury that they may determine from the evidence whether the facts assumed in a hypothetical question are proved, and that, if they find that it incorrectly assumes the existence of material facts to such an extent as to impair the value of an expert's opinion based thereon, they may regard the opinion as of little or no weight.

**WITNESSES — INSANITY—COMPETENCY OF NONEXPERTS.**—A nonexpert witness may be heard upon the question of insanity, but his competency to express an opinion must first appear, and whether he is competent or not is a question for the court.

**WITNESSES—INSANITY—NONEXPERT, WHEN INCOMPETENT.**—If the sanity of a deceased person is in question, a non-expert witness who had but a passing acquaintance with him, and who had not spoken to him for eight months or a year prior to his death, is incompetent to testify on the point, for want of sufficient knowledge of the acts and conduct of the deceased.

**EVIDENCE — INSANITY — SELF-DESTRUCTION.**—While there is no presumption of law that self-destruction arises from insanity, yet the fact of self-destruction, the manner and mode thereof, and all the attending circumstances, may be considered in determining the question of the insanity of the deceased.

**INSURANCE — LIFE — INSANITY—SELF-DESTRUCTION—LIABILITY.**—If a policy of life insurance contains no provision on the subject, the death of the insured by his own act resulting from insanity is as much insured against as death resulting from any other physical affliction.

**INSURANCE — MUTUAL BENEFIT SOCIETIES—INSANITY—SUICIDE—LIABILITY.**—Although an insurance certificate of a mutual benefit society limits its liability, in case of "suicide," to the amount actually paid in, yet the society is answerable for the full amount of the certificate, although the insured did commit suicide, if the act was done while his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences, and effect of his suicidal act, or if he was impelled thereto by an uncontrollable insane impulse.

Assumpsit, brought in the circuit court, by Catherine Wieting, the appellee, against the appellant lodge to recover on a beneficiary certificate, insuring the life of William Wieting for the benefit of the appellee, his wife. It was provided in the certificate that, in case of "suicide" by the insured, the liability of the society should be limited to the amount actually paid in. The insured did come to his death by suicide, and the principal issue

submitted to the jury was whether the act of taking his own life would bar a recovery under the certificate, as there was evidence produced on behalf of the parties respectively, the appellee contending that the self-destruction of the insured, while insane and incapable of discerning between right and wrong, was not within the provision of the certificate of insurance. There was a judgment for the plaintiff in the sum of two thousand and seventy-two dollars, which was affirmed by the appellate court, and the lodge appealed to the supreme court.

John P. Ahrens, for the appellant.

Jack & Tichenor, for the appellee.

**412** BOGGS, J. It is assigned for error the circuit court refused to permit certain veniremen to answer questions of the appellant lodge touching their competency to sit as jurors in the case. None of the persons to whom such questions were propounded were accepted on the jury. The appellant did not exhaust its peremptory challenges, and it does not appear it sought to propound the questions to any venireman who afterward served on the jury. An unobjectionable jury was obtained, and it is therefore immaterial to determine whether the court ruled correctly as to the propriety of the questions referred to.

It is urged the court erred in permitting the appellee to introduce the verdict rendered by the jury at the inquest held by the coroner over the body of the deceased assured, and in permitting certain hypothetical questions, hereinafter set forth, propounded by the appellee to certain witnesses, to be answered by such witnesses, and in refusing to allow Frantz Taylor, a witness introduced by the appellant lodge, to express an opinion as to the sanity of the assured.

The current of authority is, post mortem inquisitions made under the authority of the coroner are admissible in evidence: 1 Greenleaf on Evidence, sec. 556; Starkie on Evidence, sec. 404; United States Life Ins. Co. v. Vocke, 129 Ill. 557.

The first ground of objection to the hypothetical question is, that it was so framed as to apply to the deceased by name, instead of a supposititious person, the remaining objection to the hypothetical question being that the supposed facts, or many of them, stated in the question, were beyond the range of the evidence. The hypothetical question could not but have been understood by the jury to have reference to the deceased assured, and we are unable to see the appellant lodge was, or could have been in any way, prejudicially affected by the insertion of his name in the question. We think the propositions **413** of supposi-



titious facts set out in the question were fully in accordance with the intendments and effect of the evidence. The rule is, "the party seeking the opinion of an expert may, within reasonable limits, put his case hypothetically as he claims it to have been proven and take the opinion of the witness thereon, leaving the jury to determine whether the case as put is the one proven": 1 Am. & Eng. Ency. of Law, 514. If it was feared the question contained statements of alleged facts which were not proven, and that the jury might be led to accept them simply because they were incorporated in the hypothesis, it was competent for the appellant lodge to caution the jury by an instruction, directing them they were not to take for granted statements in the question, but should carefully scrutinize the evidence and determine which, if any, of the averments were true, and if the question incorrectly assumed the existence of material facts to such an extent as to impair the value of an opinion based on the question, they might regard the opinion of little or no weight: *Forsyth v. Doolittle*, 120 U. S. 73; *Gueting v. State*, 66 Ind. 94; 32 Am. Rep. 99; *Goodwin v. State*, 96 Ind. 550.

We do not think error demanding a reversal occurred in the refusal of the court to permit the witness Taylor to express an opinion on the question of the sanity of the deceased. The court recognized the rule that any witness who had been familiar with the deceased was competent to express an opinion as to his sanity, and a number of such witnesses produced on behalf of the parties, respectively, did give in evidence their conclusions on that question. The court refused to allow Taylor to express an opinion, on the ground it did not appear he was sufficiently familiar with, and had not had sufficient opportunity to judge of, the mental condition of the alleged insane person. While a nonexpert witness may be heard upon the question of insanity, yet his competency to express an opinion must first appear, and whether he is competent is a question for the court. It appeared <sup>414</sup> the witness had but a passing acquaintance with the deceased and had not spoken to him probably within a year—certainly not within eight months—prior to his death. The court correctly ruled the witness had not sufficient knowledge of the acts and conduct of the deceased to qualify him to testify on the point.

The appellant lodge, by special plea, interposed as a defense that the assured fraudulently and untruthfully stated in his application for insurance that he had never had any of the following diseases, viz., "habitual headache, sunstroke," etc., and that such representations were false and known by the applicant to be false, and were material to the risk. It is urged this special plea was

supported by evidence which was not controverted, and the judgment should be reversed on that ground. The appellant lodge produced no witnesses or other testimony in its own behalf in support of its plea. Upon cross-examination of the appellee, testimony was produced which tended to show the deceased had suffered a sunstroke prior to making the application, and that he at times suffered from headache. Other testimony produced by appellee tended to contradict that thus elicited on cross-examination. The burden of supporting the plea by a preponderance of the evidence was upon the appellant lodge. The court, at its request, instructed the jury, if they believed the representations in question were untrue, and that the certificate was issued upon the faith of the answers, and the lodge was not informed as to the untruthfulness of the answers until after the death of the said William Wieting, the plaintiff was not entitled to recover, and their verdict should be for the defendant. The jury, by its verdict, found the plea was not supported by a preponderance of the evidence, and the appellate court has affirmed that finding. It is not our province to determine as to the preponderance of the evidence, but we must accept the judgment of the appellate court as final upon that question.

415 Complaint is made the court refused to give, as asked by appellant, the following instruction: "The court instructs the jury that if they believe, from the evidence, that said William Wieting took his own life, that fact alone does not raise a presumption, and is not of itself evidence that he was insane at the time of committing said act."

But the court refused to give the instruction in that form, but modified it by adding thereto the following: "But the jury may weigh such act and the circumstances attending it, so far as disclosed by the evidence, in connection with all the evidence in the case bearing on that question, in determining his mental condition at the time of the act of self-destruction."

There is no presumption of law that self-destruction arises from insanity. The law presumes normal conditions to exist—hence, that all men are sane. Insanity, being an abnormal condition, must be proven as a question of fact. The acts and conduct and delusions, if any, of the person whose mental condition is the subject of inquiry, including the act of self-destruction and the attending circumstances, are proper for consideration in determining the fact. The law does not declare that one who takes his own life is to be deemed, as a matter of law, to be insane, nor that the act of suicide shall not be considered in determining whether such person was in fact possessed of a sound

mind. Whether insane or not is a question of fact, in determining which it is competent to consider the acts and conduct of the party in question, and no reason is perceived why the act of self-destruction, the manner and mode thereof, and all attending circumstances, should be excluded from consideration. This view finds support in *Karow v. Continental Life Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17, and *Terry v. Imperial Fire Ins. Co.*, 3 Dill. 408. The instruction as modified properly left the question of insanity to be determined from the evidence as one of fact.

<sup>416</sup> The case of *Crum v. Thornley*, 47 Ill. 192, announces no doctrine at variance with what we have stated. That case declares it has not been judicially decided that an attempt to commit suicide is *per se* evidence of insanity—that is, insanity is not conclusively established by such proof. One who commits suicide may or may not be insane, but the fact of self-destruction is proper for consideration in arriving at a conclusion as to the soundness of mind of such person.

It is further complained the court refused to give the following instruction: "The court instructs the jury that in and by the beneficiary certificate offered in evidence it is provided that should the said William Wieting commit suicide, then and in that case only the amount paid by the said William Wieting into the beneficiary fund of the defendant by virtue of said beneficiary certificate shall be paid to the beneficiaries therein mentioned, which said amount shall be in full of all demands whatsoever arising out of or under said beneficiary certificate; and if the jury believe, from the evidence, that the said William Wieting came to his death by hanging himself, and that he did not hang himself by accident, then the court instructs the jury, as a matter of law, that the defendant is not liable on the beneficiary certificate sued on, except to the extent of the amount paid by said William Wieting into the beneficiary fund of the defendant by virtue of said beneficiary certificate; and if the jury believe, from the evidence, that said hanging was not accidental, as aforesaid, then it is immaterial in this case whether said William Wieting at that time was sane or insane, or whether or not he was then able to understand the moral character and general nature, consequences, and effect of the said act he was about to commit, or whether or not he was then impelled thereto by an insane impulse which he had not the power to resist."

<sup>417</sup> After the refusal of the foregoing the appellant asked and the court gave the following instructions, viz:

"The court instructs the jury that they are the sole judges of the facts in this case, and although the jury may believe, from



the evidence, that said William Wieting at times acted strangely and in such a manner as to cause some people to believe him to be insane, yet if they believe, from all the evidence in the case, that said William Wieting, when he committed the acts of hanging himself by his own hand, was not so insane but that he knew what he was doing, that he knew death would result from the act, and that he committed the act intentionally to put an end to his life, and that at the time his mental faculties were not so impaired but that he was able to understand the moral character and general nature, consequence, and effect of the act he was about to commit, and that he was not impelled thereto by such an insane impulse as he had not the power to resist, then the court instructs the jury, as a matter of law, that the defendant is not liable upon the beneficiary certificates sued on in this case, except to the extent of the amount paid by the said William Wieting into the beneficiary fund of the defendant, which it is admitted by the parties is twenty-six dollars and twenty-five cents."

"If the jury believe, from the evidence, that said William Wieting came to his death by hanging himself, and although the jury may further believe, from the evidence, that said William Wieting was then insane, and that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of insanity, yet if the jury further believe, from the evidence, that said William Wieting was not then in a state of madness or delirium, and that such act of self-destruction was the result of the will and intention of said William Wieting, he adapting the means to the end and contemplating the physical nature and effects of the act, then the court instructs the jury, as a matter of law, that the defendant is not liable on the beneficiary certificate sued <sup>418</sup> on, except to the extent of the amount paid by the said William Wieting into the beneficiary fund of the defendant by virtue of said beneficiary certificate."

At the request of the appellee the court gave the following instruction upon the same point, to wit: "The court instructs the jury that suicide, or self-destruction, as these terms are to be understood in the law, implies that the act was deliberately done by a person capable, in law, of forming a legal intention to do the act; and if you find, from the evidence in this case, that the said William Wieting was insane at the time he took his life, and even though he intended that the result of his act should be death, yet if his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequence, and effect of the act

he was about to commit, or if he was impelled thereto by an insane impulse which he had not the power to resist, then his act was not suicide in the legal sense of those terms, and you should find the issues in favor of the plaintiff, so far as that issue is concerned."

The ruling of the court upon these instructions presents a question which, so far as we are aware, has never been the subject of judicial interpretation in this court.

The clause in the certificate here involved is as follows: "Provided, however, that should the said William Wieting commit suicide, then and in that case only the amount paid by the said William Wieting into the beneficiary fund by virtue hereof shall be paid to the beneficiaries above mentioned, which said amount shall be in full of all demands whatsoever arising out of or under this beneficiary certificate."

It has been uniformly held, so far as we are advised, that if the policy contains no provision on the subject, the death of the assured by his own act resulting from insanity is as much insured against as death resulting from any other physical affliction. Suicide, at common law, ranked as a crime, and was punished by forfeiture <sup>419</sup> of goods and an ignominious burial (4 Blackstone's Commentaries, 189, 190), and many authorities, in view of this fact, have construed clauses in policies exempting the insurer from liability if the assured should "commit suicide" as effective only when the circumstances of the self-killing and the mental condition of the assured were such it would have been deemed at the common law he had committed the crime of self-murder. Perhaps such rulings induced insurers to adopt other phrases, such as "die by his own hand," "take his own life," "die by his own act," etc. In America, however, self-destruction is not a crime, and the meaning given to the word "suicide" in criminal law seems to have been abandoned in the construction of insurance policies, and the phrase "commit suicide" has been declared synonymous with the other phrases employed to convey the idea of voluntary, intentional self-destruction: *Insurance Co. v. Terry*, 15 Wall. 580; *Schultz v. Insurance Co.*, 40 Ohio St. 217; 48 Am. Rep. 676; *Breasted v. Farmers' Loan etc. Co.*, 4 Hill, 74; *St. Louis etc. Ins. Co. v. Graves*, 6 Bush, 268; *McIntire v. Norwich Ins. Co.*, 102 Mass. 230; 3 Am. Rep. 458; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; 19 Am. Rep. 623; 2 Bid-  
dle on Insurance, 831, 832.

It is believed there is a substantial concurrence of judicial decision in America on the proposition that if, at the time of the suicidal act, the assured was so affected with insanity as to be un-

conscious of the act or of the physical effect thereof, or was driven to its commission by an insane impulse which he had not the power to resist, the act of self-destruction is regarded as though it were the result of accident or some irresistible external force, and the proviso of a policy framed as the one at bar, or where other phrases denoting self-destruction are used, will not attach, but the insurer will be held liable.

There is much conflict of opinion and authority as to the effect of the condition or proviso of the policy when insanity had so far overcome the consciousness of the assured as that he is unable to appreciate the moral wrong involved in the act of taking his own life, though he had <sup>420</sup> mind enough to intend the act and was aware of its physical effect. The supreme court of the United States is committed to the doctrine that, in order to relieve the insurer from liability because of a proviso of the character here involved, there must have been sufficient mental understanding to realize the moral turpitude of the act of self-destruction: *Life Ins. Co. v. Terry*, 15 Wall. 580; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121.

In *Life Ins. Co. v. Terry*, 15 Wall. 580, after a full review of previous decisions, the court remarked: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

This view has met the approval of the court of last resort in the state of New York: *Vanzandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215; *Newton v. Mutual etc. Ins. Co.*, 76 N. Y. 426; 32 Am. Rep. 335; *Pennsylvania Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; 27 Am. Rep. 689; *American Life Ins. Co. v. Isett*, 74 Pa. St. 176; Maryland: *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *Bank of Oil City v. Guardian etc. Ins. Co.* (Pa., June, 1874), 5 Big. Ins. Cas. 478; Tennessee: *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; 19 Am.



Rep. 623; Georgia: Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Life Assn. of America v. Wallar, 57 Ga. 533; Michigan: John Hancock etc. Ins. Co. v. Moore, 34 Mich. 41; Vermont: Hathaway v. National Life Ins. Co., 48 Vt. 335; and Ohio: <sup>421</sup> Schultz v. Insurance Co., 40 Ohio St. 217; 48 Am. Rep. 676. And upon principle, as well as what seems to be the prevailing judicial sentiment in the United States, we accept and adopt it.

It will be observed the rulings of the court on granting and refusing the instructions under consideration are in harmony with the doctrine we regard as correct. The evidence tended to show the moral perceptions of the assured were overpowered by his insanity, and we have no jurisdiction to scrutinize it further.

Exceptions taken to the ruling of the court upon other instructions raised the same questions of law and are disposed of by what has already been said.

No error appearing in the record the judgment of the appellate court is affirmed.

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**WITNESSES—HYPOTHETICAL QUESTIONS.**—Although hypothetical questions put to experts should, as a general rule, be based upon facts which the evidence tends to prove, yet it is not required that the facts should be conceded, nor is technical accuracy required in framing the questions: Meeker v. Meeker, 74 Iowa, 352; 7 Am. St. Rep. 489; extended note to Quinn v. Higgins, 53 Am. Rep. 307-309. An opinion "based upon a hypothesis" which is "wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight": Guetig v. State, 66 Ind. 94; 32 Am. Rep. 99.

**WITNESSES—INSANITY—NONEXPERTS.**—The opinion of a nonprofessional witness, on a question of insanity, may be given in evidence, in connection with the facts upon which it is founded, and as derived from them: Maxwell v. Harrison, 8 Ga. 61; 52 Am. Dec. 385; Morse v. Crawford, 17 Vt. 499; 44 Am. Dec. 349; Doe v. Reagan, 5 Blackf. 217; 33 Am. Dec. 466; Pidecock v. Potter, 68 Pa. St. 342; 8 Am. Rep. 181; monographic note to Dickinson v. Barber, 6 Am. Dec. 59-61. The competency of the witness, however, is a question for the court: Dickson v. Waldron, 135 Ind. 507; 41 Am. St. Rep. 440.

**SUICIDE AS EVIDENCE OF INSANITY.**—Suicide may be considered, in connection with other evidence, to establish insanity, but it does not, of itself, establish that fact: Jones v. Gorham, 90 Ky. 622; 29 Am. St. Rep. 423.

**LIFE INSURANCE—INSANITY—SUICIDE.**—In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, unless some provision is made therefor in the policy: Kerr v. Minnesota etc. Assn., 39 Minn. 174; 12 Am. St. Rep. 631. That a life policy, conditioned to be void if the insured shall die by suicide, is not avoided by the self-destruction of the insured when insane, see notes to Kerr v. Minnesota etc. Assn., 12 Am. St. Rep. 636; Streeter v. Western Ins. Co., 8 Am. St. Rep. 885; Darrow v. Family Fund Soc., 15 Am. St. Rep. 436. See Billings v. Accident Ins. Co., 64 Vt. 78; 33 Am. St. Rep. 913. The burden is upon him who seeks to recover on the policy, to show that the insured was insane at the time he killed himself, and that his self-

destruction was not the act of one responsible for his actions: See monographic note to *Meadows v. Pacific etc. Ins. Co.*, 50 Am. St. Rep. 443, on evidence of cause of death in accident insurance. Compare note to *Darrow v. Family Fund Soc.*, 15 Am. St. Rep. 436.

## WHITE v. SHERMAN.

[168 ILLINOIS, 589.]

**TRUSTS—INVESTMENT OF FUNDS—SECURITIES OF PRIVATE BUSINESS CORPORATIONS.**—If there are no express directions in an instrument creating a trust, and no statutory provisions, in relation to the character of the securities in which trust funds may be invested, a trustee cannot invest such funds in stocks, bonds, or other securities of private business corporations.

**TRUSTS—INVESTMENT OF FUNDS—REAL ESTATE OR GOVERNMENT SECURITIES—SPECULATIVE RISKS.**—In England, trustees are required to invest trust funds in real estate securities, or in the public securities of the British government. In this country, the same requirement, in regard to making investments in real estate securities or government securities, is generally recognized by the courts. At any rate, all speculative risks are forbidden.

**TRUSTS—INVESTMENT OF FUNDS—GOOD FAITH—SELECTION OF SECURITIES.**—A trustee, in the investment of trust funds, must not only act in good faith and use sound discretion and reasonable vigilance, but, where he is appointed by a court, and acting under its directions, he must select such securities as the court will approve.

**TRUSTS—CONVERSION—BREACH OF TRUST—TRACING FUNDS—ELECTION OF CESTUI QUE TRUST.**—If a trustee has, in fact, converted trust funds to his own use, or has, without authority, invested them in any other property into which they can be distinctly traced, the cestui que trust has an election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of trust.

**TRUSTS—INVESTMENT IN TRUSTEE'S OWN NAME—CONVERSION—ACCOUNTING.**—Whatever the actual intention of a trustee may be, if he invests trust money in his individual name, he commits a breach of trust, which subjects him to the same liability as if there had been a willful conversion to his own use. In such cases, a strict accounting will be exacted from him.

**TRUSTS—FRAUDULENT CONDUCT—PRESUMPTION AGAINST TRUSTEE.**—Every presumption is indulged against a trustee who has personal dealings with the trust. Hence, if the conduct of the trustee, in relation to the trust property, is fraudulent in its tendency, as well as in its nature, its consequences, if injurious, are imputed to the trustee personally, and his estate will be held liable therefor.

**TRUSTS—BREACH OF TRUST—ACQUIESCENCE—WHAT IS NOT.**—A trustee cannot escape liability for a breach of trust by imperfect information concerning his acts, or by merely informing the cestuis que trust that he has committed a breach of trust. They must all concur in their acquiescence in order to protect him, and he is not exonerated where some of them are not *sul juris*, as mere knowledge and noninterference by a cestui que trust before his interest has come into possession do not always bind him as acquiescing in the breach of trust.

**TRUSTS—BREACH OF TRUST—ACQUIESCENCE—WHEN BINDING—BURDEN OF PROOF.**—Acquiescence does not release a trustee from being answerable for a breach of trust, unless the cestui que trust has full knowledge of the particular transaction constituting the breach of trust, and of his legal rights in the premises, and is under no disability to assert them. There must be full and satisfactory proof that the cestui que trust has acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be impeachable.

**TRUSTS—WHAT ACQUIESCENCE DOES NOT BIND REMAINDERMAN.**—As a general rule, acquiescence, in a breach of trust, by a tenant for life, or by a cestui que trust for life, does not bind the person entitled to the remainder.

**TRUSTS—ACQUIESCENCE IN PURCHASE OF RAILROAD STOCKS—WHAT IS NOT.**—Acquiescence of cestuis que trust in the trustee's purchase of fluctuating railroad securities is not shown by the fact that the trustee, in an interview with some of the beneficiaries, made some statement about the difficulty of lending the trust moneys, and suggested the purchase of railroad stocks therewith, to which one beneficiary, with the concurrence of the others, replied that the trustee should "use his own judgment." As the trustee is not thus authorized by the beneficiaries to invest in railroad securities, they are not estopped to treat each purchase as a breach of trust and to call for an accounting.

**TRUSTS—INVESTMENTS—STOCKS—AVOIDING DIRECTION OF COURT.**—It is the duty of a trustee appointed by the court to execute the provisions of a will to call for the direction of the court, when necessary, in the matter of investing the funds of the trust estate. He cannot, therefore, justify the purchase of railroad stocks, with such funds, in his own name, without such direction, by showing that it might be necessary to dispose of the stocks quickly, and before an order of the court could be obtained.

**TRUSTS—BREACH OF TRUST—INVESTMENT IN STOCKS—ACCOUNTING—INTEREST.**—If a trustee commits a breach of trust by investing trust moneys in railroad stocks, without authority, he is chargeable, upon an accounting in equity, to the cestui que trust, with interest on the sums invested, at legal rates, with annual rests, from the date of the investments, less deductions for all dividends received with like interest.

**TRUSTS—COMMISSIONS ON INSURANCE PREMIUMS—TRUSTEE CANNOT PROFIT BY.**—If a trustee holds trust property to be insured and joins an underwriters' association for the purpose of obtaining a commission on the premiums paid for such insurance, he will not be allowed to profit by the arrangement, although the trust estate does not suffer, but must account, as trustee, for such commission, less the fees paid for his membership in the association.

**JUDGMENT—RES JUDICATA—WHAT ESSENTIAL TO A BAR.**—To constitute a bar, a former adjudication must have been on what was actually in issue, and the determination of which was essential to the judgment.

**JUDGMENT—RES JUDICATA—RECITAL IN DECREE.**—The mere preliminary recital in a decree entered by consent upon a bill praying for the appointment of a successor to a deceased trustee, that the deceased "had faithfully discharged his duties as trustee" does not preclude the beneficiaries in the trust, in a subsequent suit for an accounting, from questioning the validity of the trustee's investment of trust moneys in railroad stocks.



Bill in equity. Francis C. Sherman died testate on November 7, 1870, leaving a widow, children, and grandchildren. The trustee named in his will resigned, and his successor, appointed by the court, served until July 15, 1885, when the circuit court declared the trust vacant, and appointed Hugh A. White as trustee under the provisions of the will, who acted until March 24, 1894, when he died. In Sherman's will, the "Sherman House property" was devised in trust for certain uses and purposes and upon certain conditions, and the trustee was authorized to insure the property. When White entered upon the duties of his trust on October 21, 1886, there was a mortgage on this property of four hundred and fifty thousand dollars, payable July 1, 1892. White was required by the terms of the will, after the payment of taxes, insurance, interest on borrowed money, etc., to accumulate the rents, and, after paying three thousand dollars a year to each of two children of the testator, to apply the remainder of the rents to the reduction of the mortgage; but, as it did not mature until July 1, 1892, rents accumulated in the hands of the trustee, and White invested some of them in stocks. On February 25, 1888, he purchased, with funds of the trust estate, one hundred shares of stock of the Chicago, Rock Island, and Pacific Railroad Company for eleven thousand three hundred dollars, taking the certificate therefor in his own individual name; and, on October 27, 1888, he purchased another hundred shares of the same stock, and also one hundred shares of the Missouri Pacific Railroad Company's stock, using eighteen thousand one hundred and fifty dollars of the funds of the trust estate with which to make such purchases. The total paid by White for the three hundred shares of railroad stock was twenty-nine thousand four hundred and fifty dollars. These stocks were still in his possession when he died on March 24, 1894. Their value, however, had declined, so that their market value, at the time of his death, was only about fifteen thousand five hundred dollars; and they continued to decline in value subsequently to his death. On April 23, 1894, Francis T. Sherman, a child and heir at law of the testator, filed a bill in the circuit court, making his children, and his sister, and her children, and Catharine M. White, the executrix and sole legatee under Hugh A. White's will, defendants thereto. He prayed for the appointment of a new trustee, under the will, as the successor of Hugh A. White, deceased, and also that Catharine M. White should be required to account with such trustee in reference to the trust estate. A decree was entered on April 24, 1894, by consent, in which it was found that an extension of time for payment on the mortgage

had been procured. This decree appointed James H. Swan to succeed White as trustee of the Sherman estate under the will, and it was ordered that Catharine M. White turn over to him the papers, deeds, leases, books, and documents of the estate held by her, and account with Swan, the trustee. She turned over to him a part of the papers, etc., pertaining to the estate, and paid to him the sum of seven thousand seven hundred and ninety-one dollars and eighty-three cents, belonging to the estate. She claimed, however, that the three hundred shares of railroad stock belonged to the trust estate, and should be charged thereto at the cost thereof; and she offered to transfer to Swan, as trustee, the certificates of stock in payment of the sum of twenty-nine thousand four hundred and fifty dollars used by White from the funds of the Sherman estate in purchasing the securities. Swan refused to receive the depreciated stocks from her, and claimed that the estate of White was answerable for their original cost. This bill was therefore filed on April 15, 1895, by James H. Swan and the children and grandchildren of the said testator, against the plaintiff in error, Catharine M. White, to compel her to account for and to turn over to Swan, as such trustee, the moneys claimed to be due from White's estate to the Sherman trust estate. It also sought to recover certain sums of money, which White was charged with having received as commissions on insurance effected upon the trust property. Upon a reference of the matter to a master in chancery, the master, in his report, found against the complainants' right to recover from White's estate the original amount paid for the stocks, upon the ground that they were estopped from disavowing the trustee's acts in buying the stocks; but he found that White's estate was chargeable with the commissions on insurance premiums received by him. The circuit court entered a decree confirming the master's report, except that it allowed White's estate credit for certain membership fees, admitted to have been paid by White as a member of a certain underwriters' association. That court found that it was the duty of Swan, as successor in trust, to receive the railroad stocks and the dividends thereon as the property of the trust estate, and directed Catharine M. White to indorse and deliver such stocks to him, as such trustee. It also directed Swan to accept the stocks in full satisfaction of any claims on the part of the Sherman estate by reason of White's purchase of the stocks. It was also found, by the decree of the circuit court, that Catharine M. White was chargeable, as executrix, with the amount of the commissions on insurance premiums received by White, less the amount paid by him as membership fees of the

underwriters' association; and she was ordered to pay over to Swan two thousand five hundred and ninety-six dollars and four cents, that being the amount of such commissions, less the membership fees, with interest from April 27, 1894. The appellate court affirmed that part of the decree of the circuit court concerning the commissions of insurance premiums, but, in other respects, reversed the decree of that court, and remanded the cause, with directions to enter a decree charging Catharine M. White with the said sum of twenty-nine thousand four hundred and fifty dollars invested by White in the railroad stocks, making proper deductions for dividends received thereon, and allowing interest with annual rests on sums so invested from the date of the investment at the rate of six per cent per annum until July 1, 1891, and thereafter at the rate of five per cent, less the deductions for all dividends received, with like interest. Catharine M. White was also directed by the court to pay to Swan, in due course of administration, the sum so ascertained, in addition to the sum allowed on account of insurance commissions and interest. During the pendency of the case in the appellate court, the trustee, Swan, died, and Edward H. Reed, his successor in trust, having been appointed by the circuit court, was made a party to the cause in the place of Swan. This appeal was prosecuted by a writ of error from the judgment of the appellate court.

Harvey B. Hurd, for the appellant.

Bayley & Webster, for the appellees.

601 MAGRUDER, J. The questions involved in this case relate to the liability of the estate of Hugh A. White, deceased, growing out of his purchase of three hundred shares of railroad stocks with the funds of the Sherman trust estate, and 602 growing out of his collection of commissions upon premiums paid by him for insurance upon the property of the trust estate. Did White, as trustee of the Sherman estate, have the right, or was he authorized, to invest the funds of the estate in the railroad stocks in question? Did White, as such trustee, have the right to appropriate to his own use such commissions so as aforesaid received by him?

1. The will of Francis C. Sherman is silent as to the mode of investing the rents accumulating prior to the date for the application thereof upon the mortgage resting upon the property. Where there are no express directions in the instrument creating the trust, and no statutory provisions, in relation to the character of the securities in which trust funds may be invested, a trustee



cannot invest such funds in stocks, bonds, or other securities of private business corporations. In England, trustees are required to invest trust funds in real estate securities, or in the public securities of the British government. In this country, the same requirement, in regard to making investments in real estate securities or government securities, is generally recognized by the courts. At any rate, "all speculative risks are forbidden": 2 Pomeroy's Equity Jurisprudence, sec. 1074. The rule is, that in the investment of trust funds, the trustee must not only act in good faith and use sound discretion and reasonable vigilance, but where he is appointed by a court and is acting under the directions of a court, he must select such securities as the court will approve: 11 Am. & Eng. Ency. of Law, 814.

In the case at bar, the evidence shows that the railroad stocks, in which the trustee, White, invested the trust funds of the Sherman estate, were very fluctuating and speculative. In fact, one of the witnesses speaks of them as being "wildcat" securities. The speculative character of these securities was well known to the trustee, White. White dealt in such stocks through brokers <sup>603</sup> for more than six years before his death, buying and selling the same to the amount of about two million dollars; the amount of money, however, which actually changed hands in the buying and selling of said stocks of the actual cash value of two million dollars, was only about fifty thousand dollars. After he made his first purchase of these stocks on February 25, 1888, to wit, of the one hundred shares of Chicago, Rock Island, and Pacific railroad stocks, and before he made his second purchase on October 27, 1888, such stocks had begun to decline. The one hundred shares first purchased were bought at one hundred and thirteen dollars per share, but in July, 1888, such stocks had declined in value to a sum less than one hundred and seven dollars per share. Notwithstanding this decline, White in October made another investment in the same class of securities by purchasing an additional one hundred shares of said Chicago, Rock Island, and Pacific railroad stock.

2. The evidence is clear that all the railroad stocks so purchased by White were purchased in his own individual name, and not by him as trustee of the estate. The certificates, made out when the stock was issued to him, were made out in his own name, and he appeared upon the books of the company issuing the stocks as the individual owner thereof, and not as the owner thereof in trust for the estate of which he was the trustee. In all his communications with the beneficiaries in the trust for whom he was acting, whether such communications were made

to them orally or by written report, he concealed, or failed to mention, the fact that the stocks stood in his own name.

When a trustee has in fact converted trust funds to his own use, or, without authority, has invested the trust funds in any other property into which such funds can be distinctly traced, the cestui que trust has an election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of trust: 2 Story's Equity Jurisprudence, secs. 1262, 1263; *Breit v. Yeaton*, 101 Ill. 604 242. Whatever the actual intention of the trustee may be, the weight of authority seems to be, that, where he invests trust money in his individual name, he commits a breach of trust, which subjects him to the same liability as if there had been a willful conversion to his own use: *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa. St. 431; 49 Am. Dec. 530; *McAllister v. Commonwealth*, 30 Pa. St. 536; 2 Pomeroy's Equity Jurisprudence, sec. 1079; *Gilbert v. Welsch*, 75 Ind. 557; *Naltner v. Dolan*, 108 Ind. 500; 58 Am. Rep. 61, and cases cited; *De Jarnette v. De Jarnette*, 41 Ala. 708. The doctrine is a familiar one, that every presumption is indulged against the trustee who has personal dealings with the trust. Where the conduct of the trustee in relation to the trust property is fraudulent in its tendency, as well as in its nature, its consequences, if injurious, are imputed to the trustee personally, and his estate will be held liable therefor: 27 Am. & Eng. Ency. of Law, 193, 196.

The authorities are uniform to the effect that the trustee may not deposit the trust funds in his own name. When he has converted the trust funds to his own use by investing them in his own name, he will be held to a strict accountability for the conversion, and the trust will follow the investment at the option of the cestui que trust. In such cases, a strict accounting will be exacted from him: 27 Am. & Eng. Ency. of Law, 160-163; *MacDonnell v. Harding*, 7 Sim. 178; *Massey v. Banner*, 1 Jacob & W. 241; 2 Pomeroy's Equity Jurisprudence, 1076; *Jenkins v. Walter*, 8 Gill & J. 218; 29 Am. Dec. 539; *Summers v. Reynolds*, 95 N. C. 404; *Syme v. Badger*, 92 N. C. 706; *Brown v. Dunham*, 11 Gray, 42; *Williams v. Williams*, 55 Wis. 300; 42 Am. Rep. 708.

It is said that White's books showed the purchase of these stocks with trust funds, and that he reported the same to the heirs; and that, therefore, he would be precluded from claiming them as his individual property. This would undoubtedly be true if the beneficiaries were claiming that they, and not he, were the owners of the stocks; but it is optional with the beneficiaries

either to <sup>605</sup> take the stocks, or to call for the amount originally invested therein, unless they are estopped by acquiescence or ratification.

3. It is, however, claimed by plaintiff in error that the complainants herein are estopped from questioning the investments, made by White in these railroad securities, upon the alleged ground that they had knowledge of such investments and acquiesced in them. Such acquiescence and knowledge are sought to be established by the testimony of the stenographer, who had been in the service of White in his lifetime, and by the contents of certain reports, relating to his management of the trust, which he submitted to the beneficiaries therein semi-annually. It is not, nor can it be, claimed that any of this testimony in regard to acquiescence is binding upon the trustee, Reed, or his predecessor, the trustee, Swan, who were appointed long after the death of White.

Even though a trustee may have acted with the best intention, yet, if the trust estate has been wasted by his own breach of trust, there can be no question as to his liability, unless the beneficiary sanctions, or acquiesces in, the wrong with full knowledge of the facts, or of his rights in the premises. In order to bind a cestui que trust by acquiescence in a breach of trust by the trustee, it must appear that the cestui que trust knew all the facts, and was apprised of his legal rights, and was under no disability to assert them. Such proof must be full and satisfactory. The cestui que trust must be shown, in such case, to have acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might or ought with reasonable or proper diligence, to have known to be impeachable. His acquiescence amounts to nothing if his right to impeach is concealed from him, or if a free disclosure is not made to him of every circumstance which it is material for him to know. He cannot be held to have recognized the validity of a particular investment unless the question as <sup>606</sup> to such validity appears to have come before him. The trustee setting up the acquiescence of the cestui que trust must prove such acquiescence. The trustee must also see to it that all the cestuis que trust concur, in order to protect him from a breach of trust. If any of the beneficiaries are not sui juris, they will not be bound by acts charged against them as acts of acquiescence. The trustee cannot escape the liability merely by informing the cestuis que trust that he has committed a breach of trust. The trustee is bound to know what his own duty is, and cannot throw upon the cestuis que trust the obligation of telling him what such duty is. Mere



knowledge and noninterference by the cestui que trust before his interest has come into possession do not always bind him as acquiescing in the breach of trust. As a general rule, acquiescence by a tenant for life, or by a cestui que trust for life, will not bind the person entitled to the remainder: *Zimmerman v. Fraley*, 70 Md. 561; *Kerr on Fraud*, Bump's ed., 297, 299-301, 312; 2 *Pomeroy's Equity Jurisprudence*, 1083, note; *Perry on Trusts*, secs. 295, 467; *Life Assn. v. Siddal*, 3 De Gex, F. & J. 58. Imperfect information will be regarded as equivalent to concealment; and a person is not estopped by his silence when there is no positive duty or opportunity to speak; nor will mere delay, short of the period fixed as a bar by the statute of limitations, preclude the assertion of his equitable rights: *Phillipson v. Gatty*, 7 Hare, 516; *Bispham's Hill on Trustees*, 526; 7 *Am. & Eng. Ency. of Law*, 13, note, and cases cited; 1 *Perry on Trusts*, sec. 467; *Gibbons v. Hoag*, 95 Ill. 45; *Henry County v. Winnebago Drainage Co.*, 52 Ill. 454.

Some testimony was introduced tending to show that, early in the year 1887, White called some of the beneficiaries in the trust to his office, and brought up the question as to how the rents should be temporarily invested before the arrival of the period for their application upon the mortgage. At this interview all the beneficiaries were not present. Three of them were absent; two of them at that time were under age. Only two, to wit, the two children of the testator, were entitled to any portion of the income from the rents. The grandchildren of the testator were mere remaindermen. We do not deem it necessary to enter into a discussion of the question whether the remainder was a vested or a contingent remainder. It is said that White then made some statement about the difficulty of lending the money for short periods by making real estate loans, or call loans; and suggested something about buying railroad stocks. The testimony upon this subject is that of one witness, who was a stenographer of White; it is not clear as to the extent to which he communicated with the beneficiaries upon the subject of investing in railroad securities; but it is clear that he was told by one of the beneficiaries present to use his own judgment in regard to the matter. This statement by one seems to have been concurred in by all the others who were present. He was not thus authorized by them to invest in railroad securities. They did not choose, and were not bound, to exercise any judgment upon the subject. He had control of the estate; and the matter of investment was entirely within his own discretion, subject to the rules of law. In saying to him that he should use his own judgment, they merely

said to him what the law had already said to him. They refused to take any responsibility in the matter. We cannot see that there was anything in the interview in 1887 upon this subject which amounted to any authorization to him to invest the funds of the estate in railroad stocks.

The stenographer, who testified to this interview, says that White took the stocks in his own name, so as not to be obliged to apply to the court in case he should desire to sell them. The reason given for not wishing to make such application to the court was that it might be necessary to dispose of the stocks quickly, and an application to the court would create delay. We do not regard this reason for taking securities in his own name as sufficient. <sup>608</sup> He was a trustee appointed by the court in accordance with the provisions of the will, and it was his duty to call for the direction of the court when necessary, and to act under the orders of the court when necessary. It was not, therefore, proper for him to put himself in such position as would relieve him from the necessity of asking the direction of the court.

As to the reports which White made to the heirs semi-annually, we concur with the appellate court, which says in its opinion in regard to these reports: "That the reports were misleading must be apparent to anyone who, without other information, should examine them." These reports concealed the fact that the securities had been taken in White's name; and also concealed the fact that the securities were steadily declining in value all the time.

The appellate court further says: "In his report of July 1, 1888, which was the report next following the purchase of the first one hundred shares of the Rock Island stock, it was made to appear that he had bought for the estate some stock in that company—but without specifying how many shares—to the amount of eleven thousand three hundred dollars and had received a dividend thereon. In his report of January 1, 1889, which was the one next following the purchase of the one hundred shares in the Missouri Pacific company, and another like number of shares in the Rock Island company, he made no mention of having purchased these stocks, but, presumably in order to account for the money paid for them, his report stated as follows: 'Pd. Winchester & Co., acc't loan, voucher No. 249, \$18,150.00.' In that same report, under the heading of investments and assets, he stated: 'To cash invested in railroad securities, \$29,450.00.' This amount of twenty-nine thousand four hundred and fifty dollars was the aggregate of his stock purchases as already stated, and it is carried along in

all subsequent reports down to and including July 1, 1890, under the heading of investments, as 'Cash invested in railroad securities.' <sup>609</sup> From this date it is successively called: 'Cash invested in railroad stock,' and 'invested in stocks,' until in the last report of January 1, 1894, it is denominated under the heading of 'resources,' as 'Sundry railroad stocks (cost) \$29,450.00.' Wherever in the reports there occurs a statement of receipts from the railroad companies, it is usually as interest, but is sometimes mentioned as dividends. In none of the reports is it stated, except inferentially, that any Missouri Pacific stock had ever been bought for the estate or was held by it, and in but one report, that of July 1, 1892, was it ever stated how many shares of stock in either company was owned by the estate. . . . With reference to the eighteen thousand one hundred and fifty dollars, now known to have been invested in Missouri Pacific and the second lot of Rock Island shares, and the certificates of which were taken in White's individual name, there seems never to have been any full disclosure thereof made by White. The report, which accounted for the money they cost, showed on its face a loan of that sum. It would seem to be hardly susceptible of any other reading by a person of ordinary understanding, and that it would be so interpreted by an expert bookkeeper is shown by the testimony of the expert who examined the reports in connection with White's books of account, and testified that the report showed a loan instead of a purchase, and that White's books showed the same, although it was otherwise conclusively proved that no such loan was ever made. We are unable to comprehend how the furnishing of such information can be regarded as coming within the rule that demands full information of all that is material to be given to one against whom estoppel by confirmation and acquiescence is invoked." We fully approve of the views thus expressed by the appellate court in their opinion in reference to the reports in question.

There is absolutely nothing in this record to show that, when fully informed of these investments in railroad securities, the parties in interest did not object to <sup>610</sup> the same and disapprove of the same. They are incompetent witnesses, and could not testify in this case. As to the report of July 1, 1892, upon which so much stress is laid, that report merely states what the trustee had already done; it does not ask the beneficiaries to advise him what he shall do. The fact that he stated to them what he had done is not evidence that they approved of what he had done. The remaindermen cannot be estopped by the receipt of dividends upon the stocks, because no such dividends were ever paid to



them. Nor is it apparent that such dividends entered into the sums of three thousand dollars per year, which were paid to the life tenants. So far as it is shown to the contrary, such dividends may have been applied with other money in payment of the mortgage. Consequently, we do not think that any acquiescence can be inferred from the receipt by the parties interested of dividends on the stock.

The evidence does not show that the question of the liability of the trustee for these investments was ever raised as between the trustee and the beneficiaries: Kerr on Fraud, Bump's ed., 391, and cases cited. The only positive testimony in this case is that showing the breach of trust. The testimony introduced to show ratification or acquiescence in such breach is in the nature of inference only. Upon the whole, our conclusion is, that the act of the trustee in investing the funds of the estate in these speculative securities cannot be justified on the ground of acquiescence or ratification on the part of the parties interested.

4. It is objected that plaintiff in error has been charged with compound interest. We think that she is chargeable with interest at legal rates with annual rests, on the sums invested by said White in said stocks, from the dates of the investments, less deductions for all dividends received with like interest. This rule, adopted by the appellate court, does justice to the parties, and is in accordance with the settled policy of equity: *Hough v. Harvey*, 71 Ill. 72; *Hughes v. People*, 111 Ill. 457; *Lehman v. Rothbarth*, 159 Ill. 270.

5. The plaintiff in error was liable for the full amount of the commissions, shown to have been received by her husband on insurance premiums paid by him out of the trust funds. He joined a certain underwriters' association for the purpose of getting a commission upon such premiums. He was paid a commission of seven and one-half per cent on the premiums paid by him for insurance on the Sherman House, and concealed that fact from the beneficiaries. The law does not allow a trustee to retain any personal gain, which he may obtain in such a manner as subjects him to the temptation of placing himself in a position which may be hostile to the interests of the estate, whether the estate is actually injured or not as a matter of fact. The fact that he was receiving commissions might have subjected him to a temptation to place a larger line of insurance than was necessary on the trust property. It is not essential that the estate has suffered a loss from what he has done; it is sufficient that he has gained a profit. Whether the contract was beneficial or injurious to the estate is wholly immaterial. An agent is only entitled to commis-

sions upon a faithful performance of all the duties of his agency. One of these duties is to render to his principal statements of all money received and profits made through his agency: *Fish v. Seeburger*, 154 Ill. 30; *Hoyt v. Shipherd*, 70 Ill. 309; 27 Am. & Eng. Ency. of Law, 187, 194, 196; *Perry on Trusts*, sec. 209; *Gillette v. Peppercorne*, 3 Beav. 78; 2 *Pomeroy's Equity Jurisprudence*, sec. 1075.

It was proper to deduct from the commissions received by White the fees which he paid to the underwriters' association in order to maintain his membership therein. The law only charges him with the profits which he made out of the trust estate. These profits consisted of the commissions less what he paid for membership fees.

<sup>612</sup> 6. It is said on behalf of plaintiff in error that the appellees herein are estopped by reason of a finding made in the decree entered on April 24, 1894. The decree finds, among other things, that White "faithfully discharged his duties as such trustee of said estate until the 24th of March, 1894, when he departed this life." The point is made that the validity of White's acts in investing in the railroad securities cannot be questioned in this present suit, because he was found by such decree to have faithfully discharged his duties. The finding in question is merely in the reciting part of the decree, and is not part of the final order therein. The decree in question was entered by consent. The object of the bill, filed on April 23, 1894, was to obtain the appointment of a trustee in the place of White who had died. Swan was finally appointed as successor in trust; but Swan or Reed, the main complainant in this suit, was not a party to the suit begun on April 23, 1894. It is true that the decree of April 24, 1894, appointed Swan successor in trust. But the latter decree did not involve the question as to the liability of White's estate to account for the money invested in the railroad securities. Such liability was not a question in issue in the suit in which the decree was rendered. Former adjudication, to constitute a bar, must have been on what was actually in issue, and the determination of which was essential to the judgment: 6 Am. & Eng. Ency. of Law, 794, note 4; 21 Am. & Eng. Ency. of Law, 233; *Riverside Co. v. Townshend*, 120 Ill. 9. We are of the opinion that the mere preliminary recital in the decree of April 24, 1894, that White had faithfully discharged his duties as trustee does not preclude the complainants in the present suit from questioning the validity of the investments here under consideration.

The judgment of the appellate court is affirmed.

**TRUSTS—INVESTMENT OF FUNDS.**—If there are no directions in an instrument of trust, or rules of court, or statutory provisions in relation to investments, they must be governed by sound discretion and good faith. In the absence of statutory direction, or specific authority, trustees are not permitted to invest trust funds in the stock or shares of any private corporation, although the stock is considered good by discreet business men who evince their confidence by investing their own funds therein; and no court can sanction such investments where they are against the policy of the state and expressly forbidden by its laws: *Randolph v. East Birmingham Land Co.*, 104 Ala. 355; 53 Am. St. Rep. 64, and note. This subject is discussed in the extended note to *Slauter v. Favorite*, 57 Am. Rep. 111-114, and in the monographic note to *Nyce's Estate*, 40 Am. Dec. 506-518, on investments which trustees may make without being liable for loss.

**TRUSTS—INVESTMENTS—BREACH OF TRUST—ACCOUNTING.**—A trustee cannot invest the trust property in his own name. If he does so, the cestui que trust may either insist upon a transfer of the investment, or charge the trustee with the amount invested and interest: *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; note to *Nyce's Estate*, 40 Am. Dec. 516. His investment of trust funds, in stocks, in his individual name is a breach of the trust: *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449; *Jenkins v. Walter*, 8 Gill & J. 218; 29 Am. Dec. 539. To permit trust property to be diverted from its destination, or to diminish its value, is a breach of trust: *Pearson v. Moreland*, 7 Smedes & M. 609; 45 Am. Dec. 319. A trustee may be called into a court of equity, by the cestuis que trust, at any and all times, for the purpose of having an accounting of the trust property: *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637.

**TRUSTS—INVESTMENTS—ACQUIESCENCE.**—Assent to improper investment by cestui que trust who is sui juris, with full knowledge of the facts, will estop him from holding the trustees accountable; but such assent must be with full knowledge of the facts and of their legal effect. Something more than mere failure to complain of an investment is required to constitute binding assent to it. The assent of one who has a mere life interest to an improper investment of a trust fund, will not justify it except so far as his own interest is concerned: Note to *Nyce's Estate*, 40 Am. Dec. 518.

**JUDGMENT—RES JUDICATA.**—A fact once decided cannot be again disputed between the same parties, but, to have that effect, it must have been actually litigated and determined; it must have been in issue under the pleadings; and it must have been established by a final judgment: *Fuller v. Metropolitan etc. Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84.



**HOME SAVINGS BANK v. BIERSTADT.**

[168 ILLINOIS, 618.]

**SUBROGATION—LEGAL AND CONVENTIONAL.**—The right of subrogation which springs from the mere fact of paying another's debt, as insurer, guarantor, surety, or for the purpose of protecting the right of the one who pays, is termed legal subrogation; but the right of subrogation springing from an express agreement with the debtor that the security shall be kept alive for the benefit of the person making the payment, is called conventional subrogation.

**SUBROGATION, CONVENTIONAL—PAYMENT OF FIRST MORTGAGE.**—If there are two mortgages on the same property, the second having been taken with knowledge of the first, one who, at the debtor's request, pays off the first mortgage before it is due, under an agreement that the security shall be kept alive for his benefit, and that he shall have a first lien for the money advanced, will be subrogated, in equity, as against the second mortgagee, to the rights of the first mortgagee.

**SUBROGATION—CONVENTIONAL—RELEASE OF SATISFIED ENCUMBRANCE.**—The principle of conventional subrogation will be applied, in equity, even where the record shows a release of the satisfied encumbrance, and as against a subsequent encumbrancer whose encumbrance has not been taken, or his position changed because of the record showing the discharge of the senior encumbrance; as, for example, against a second mortgagee where the first mortgage was released upon the execution of a new mortgage given to secure money advanced by a third person to discharge the first mortgage.

**SUBROGATION—VOLUNTEER.**—If a debt is paid at the request of the debtor, the person so paying is never a volunteer.

Bill to foreclose a trust deed on seven certain lots of land in Chicago. William K. Lowrey owned them on June 30, 1892, and on that date he executed to William J. Goudy, of the firm of Goudy, Shanklin & Co., a trust deed upon each of the lots to secure the gross sum of twenty-two thousand four hundred and fifty dollars, with interest at six per cent. Each of these seven trust deeds was recorded on July 21, 1892, and became a first lien on the property. Lowrey executed another trust deed, on August 10, 1892, to one C. K. Billings, on three of the same lots, to secure a note for five thousand two hundred and fifty dollars, payable to the Home Savings Bank of Chicago one year after date. This deed was filed for record on August 20, 1892. On October 22, 1892, the firm of Goudy, Shanklin & Co., becoming dissatisfied with the Lowrey loans which they held, entered into a written agreement with Lowrey to take them up by a new loan. This agreement recited that Lowrey was indebted to them in the sum of twenty-five thousand three hundred dollars, of which twenty-five thousand dollars was secured by the trust deeds mentioned, and that an attachment was levied on the seven

lots for the extra three hundred dollars. The new loan of twenty-five thousand dollars was made by Horace A. Hurlbut, who took a trust deed on the seven lots mentioned. It was requested by Lowrey and the money was paid to Goudy, Shanklin & Co., at Lowrey's request. The attachment lien was removed by a joint bond signed by Goudy, Shanklin & Co. and Lowrey. The abstract of title was brought down to include October 28, 1892, the day on which Hurlbut's trust deed was recorded. It failed, however, to show the deed of trust from Lowrey to Billings. Upon the abstract being shown, Hurlbut, who was acting for and negotiating the loan for the appellee, Mary Stewart Bierstadt, paid twenty-five thousand dollars to Goudy, Shanklin & Co., and they released the trust deeds held by themselves. The appellee had no notice of the deed of trust from Lowrey to Billings until June, 1895, when she filed her bill to foreclose the trust deed given to Hurlbut for her benefit. It was alleged therein that the loan was obtained and made for the purpose of paying off the seven trust deeds mentioned; that, at the time of the execution and recording of the trust deed made by Lowrey to Billings, both Billings and the Home Savings Bank knew of the trust deeds to Goudy upon the lots conveyed to Billings, and that they took their deeds of trust subject to that of Goudy. It was also alleged in the bill that the complainant had, through Hurlbut, paid off the Goudy trust deeds, without any notice, on her part of the existence of the Billings trust deed; and that her loan was made to Lowrey with the full belief that it was a first lien and for the sole and single purpose of discharging the Goudy trust deeds. She asked in her bill that her trust be declared a first lien, and that she be declared, in equity, to be entitled to be subrogated to the rights and lien of Goudy, Shanklin & Co. The appellants demurred to that part of the bill alleging the knowledge of Billings and the bank of the existence of the Goudy deeds, and the making of the loan for the purpose of satisfying those notes and deeds of trust at the request of Lowrey. The demurrer was overruled, and appellants elected to stand upon it. The parts of the bill demurred to were, therefore, taken as confessed, and the case was referred to a master, who found the allegations of the bill to be true, and reported that the appellee was entitled to a first lien upon the seven lots prior to the Billings trust deed. The master found the amount due the appellee, and the circuit court entered a decree therefor. It was affirmed on appeal to appellate court and this appeal was taken to the supreme court.

Winston & Meagher, James F. Meagher, and Silas H. Strawn, for the appellants.

James E. Munroe, for the appellee.

**623** PHILLIPS, C. J. Subrogation, as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases: *Bishop v. O'Conner*, 69 Ill. 431; *Borders v. Hodges*, 154 Ill. 498. Whilst these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects **624** and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person. The right of subrogation which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, is what is termed legal subrogation, and exists only where included within those classes. But, in addition to this principle of legal subrogation, there exists another principle, which is termed conventional subrogation, which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien: *Coe v. New Jersey etc. Ry. Co.*, 31 N. J. Eq. 105; *Tyrrell v. Ward*, 102 Ill. 29; *Tradesmen's etc. Assn. v. Thompson*, 32 N. J. Eq. 133.

This principle has been before this court, and the necessity and effect of such an agreement were considered in *White v. Cannon*, 125 Ill. 412, 415, where it was said: "It is only where the payment of encumbrances is necessary to protect rights of the payer, or where they are paid pursuant to an agreement with the debtor that the payer shall hold them as security for the money advanced, that the payer will be subrogated to the rights of the holders of such liens and the liens will be kept alive for his benefit. Where the demand of a creditor is paid with the money of a third person not himself a creditor, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the demand is absolutely extinguished."



It is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives the right of subrogation, because it takes away the character of a mere volunteer. Here the agreement <sup>625</sup> between the debtor and the appellee, who advanced the money, was to the effect that appellee was to advance sufficient money to discharge the seven Goudy deeds of trust, and should receive from the debtor, by way of security for the money so advanced, a first mortgage upon the seven lots. In equity, that was an agreement that the Goudy deeds of trust should become security for her loan. That was the substance of the transaction, and equity will effectuate the real intention of the parties, where no injury is done to an innocent party, by applying the principle of conventional subrogation: *Draper v. Ashley*, 104 Mich. 527; *Tyrrell v. Ward*, 102 Ill. 29; *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1058; *Levy v. Martin*, 48 Wis. 198; *Wilton v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193; *Dillon v. Kauffman*, 58 Tex. 696.

This principle will be applied even where the record shows a release of the satisfied encumbrance, as the lien so satisfied will be removed for the benefit of the party satisfying the same, where there has not been gross negligence and where justice requires it should be done, and this will be done as against a subsequent encumbrancer whose encumbrance has not been taken or his position changed because of the record showing the discharge of the senior encumbrance: *Tyrrell v. Ward*, 102 Ill. 29; *Hammond v. Barker*, 61 N. H. 53; *Campbell v. Trotter*, 100 Ill. 281; *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566; *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1058; *Bruse v. Nelson*, 35 Iowa, 157; *Draper v. Ashley*, 104 Mich. 527; *Levy v. Martin*, 48 Wis. 198.

The Goudy deed of trust was in existence and recorded when the Billings deed of trust was made and recorded, as was the latter when appellee's deed was made and recorded. So far as shown by this evidence, there was only constructive notice to Billings of the Goudy deed and to appellee of the Billings deed. And as said in *Campbell v. Trotter*, 100 Ill. 284: "Campbell took his mortgage with knowledge of Trotter's first mortgage of March 19, 1869, and as a second mortgage subordinate to Trotter's, and it should be held subordinate to that mortgage. <sup>626</sup> There has nothing occurred since, which, in equity, should displace priority. The taking the new mortgage of August 30, 1877, and entering satisfaction of the first mortgage, was, as designed by the parties, but in continuation of the lien of the first mortgage. . . . The transaction was entirely irrespective of

Campbell. . . . It was with no reference to his benefit, and should not be made to redound thereto by the advancement of his mortgage to a priority over the lien of Trotter. . . . It was through ignorance, in fact, of the existence of Campbell's mortgage that Trotter entered satisfaction of the first mortgage, and surrendered the notes, and which he would not have done had he known of Campbell's mortgage. This Trotter testifies to, and the nature of the transaction itself would satisfy one that such must have been the case."

The failure of appellee or her agent to learn of Billings' trust deed was not negligence which would bar her right to relief, when the only notice is constructive, and not actual: *Tyrrell v. Ward*, 102 Ill. 29; *Young v. Morgan*, 89 Ill. 199; *Smith v. Dinsmoor*, 119 Ill. 656; *Campbell v. Trotter*, 100 Ill. 281.

The contention urged by appellants, that the payment made by appellee was that of a mere volunteer, cannot be sustained. Where a payment is made at the request of the debtor, the person so paying is never a volunteer; and, in this case, the payment having been made at the request of the debtor, appellee was not a volunteer, merely: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566; *London etc. Mtg. Co. v. Tracy*, 58 Minn. 201; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; 24 Am. & Eng. Ency. of Law, 290.

The judgment of the appellate court for the first district is affirmed.

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**SUBROGATION—MORTGAGES.**—If a third person pays a debt at the debtor's request, upon an agreement with the latter that he shall be entitled to the benefit of the security held by the creditor, he is entitled, in equity, to be subrogated to the rights of the creditor: *Heuser v. Sharman*, 89 Iowa, 355; 48 Am. St. Rep. 390; as where he advances money to pay off a mortgage debt: *Heisler v. Aultman*, 56 Minn. 454; 45 Am. St. Rep. 486, and note; *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231. One who advances money with which to pay off a mortgage, in pursuance of an agreement that he should do so, and that the mortgage should be discharged of record, and a new mortgage given on the same property for the amount so advanced, is entitled to be subrogated to the mortgage, and to have the satisfaction set aside: *Wilton v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193, and note. So where there has been a mistake in discharging the mortgage of record: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566.

**SUBROGATION—VOLUNTEERS.**—If one who has agreed to advance money for the purpose of discharging a debt employs it himself in paying the debt and discharging the encumbrance on land given for its security, he is not to be regarded as a volunteer: *Haverford etc. Assn. v. Fire Assn.*, 180 Pa. St. 522; 57 Am. St. Rep. 657; nor is one who discharges a lien at the request of the debtor, expecting that his securities will of record take the place of that which he discharged, a volunteer, stranger, or intermeddler: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566.

ORR AND LOCKETT HARDWARE COMPANY v. NEEDHAM  
COMPANY.

[169 ILLINOIS, 100.]

**MECHANICS' LIENS.—THE AFFIDAVIT** to a claim for a mechanic's lien must be broad enough to cover all the essential statements in the claim required by the statute to be set forth.

**MECHANICS' LIENS—AFFIDAVIT—SUFFICIENCY.**—Under a mechanic's lien law requiring that claims for liens shall set forth the dates when the materials were furnished, an affidavit merely alleging that the claim contains a full and true statement of the materials furnished, and omitting to certify that the statement of claim is true in so far as it sets forth the times when the materials were furnished, is insufficient.

**Bill for a mechanic's lien.** The claim of lien set out a correct description of the real estate and buildings and the property to be charged with the lien, and the names of the owners thereof, and stated that the itemized account attached thereto and made a part thereof truly and correctly set forth the material and the dates when furnished. This claim was followed by an affidavit stating that "William H. Edwards, being first duly sworn, on oath says that the above and foregoing statement of account by him subscribed contains a full and true statement of builders' hardware furnished by the said Orr and Lockett Hardware Company for and were used in and upon the lots, real estate, and buildings therein described and that there is due and unpaid for and upon account thereof to said Orr and Lockett Hardware Company the sum of six hundred and thirteen dollars and sixty cents." This affidavit is followed with an itemized account of materials with the dates when furnished. This appeal is from a judgment dismissing complainant's bill by reason of the insufficiency of the verification of the claim.

H. C. Bennett and W. A. Phelps, for the appellant.

H. H. Rose, for the appellees.

<sup>102</sup> **CARTER, J.** The question here is, whether or not the verification of the claim of appellant for a lien, as filed in the office of the circuit clerk, is sufficient.

Section 4 of the act entitled "Liens," applicable to the case, is as follows: "Every creditor or contractor who wishes to avail himself of the provisions of this act shall file with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated, a just and true statement of account or demand due him after allowing all credits, setting forth the times when such material was furnished or labor performed, and containing a correct description



of the property to be charged with the lien, and verified by an affidavit. Any person having filed a claim for a lien, as provided in this section, may bring a suit at once to enforce the same, by bill or petition, in any court of competent jurisdiction in the county where the claim for a lien has been filed": 3 Starr and Curtis' Annotated Statutes, 819. And section 28 provides: "No creditor shall be allowed to enforce a lien created under the provisions of this act, as against or to the prejudice of any other creditor or encumbrancer or purchaser, unless a claim for a lien shall have been filed with the clerk of the circuit court, as provided in section 4 of this act, within four months after the last payment shall have become due and payable."

<sup>108</sup> In *McDonald v. Rosengarten*, 134 Ill. 126, 130, in delivering the opinion of the court, Mr. Justice Scholfield said: "The purpose of requiring the claim to set forth 'the times when such material was furnished or labor performed' is, obviously, to enable those interested to know, from the claim itself, that it is such as can be enforced, and the verification by affidavit is required as a guaranty of the claim in this as in other respects, and all this is, by section 28, indispensable to the enforcement of the lien against creditors and encumbrancers." And in *Campbell v. Jacobson*, 145 Ill. 389, 403, it was said that "the statute having required every creditor or contractor who wishes to avail himself of the provisions of the statute to file in a public office a sworn statement of a particular character, that requirement must be at least substantially complied with, and unless that is done his lien cannot be enforced."

The question here is not whether the statement or account, as such, is sufficient, but whether it is sufficiently verified by affidavit. As shown by the statute and held in the cases cited, it is indispensable that "the times when such material was furnished or labor performed" be set forth, and it necessarily follows that, if necessary to be stated, it is necessary that it should be verified by affidavit. It would not be contended that a statement sufficient in all respects except that it was not verified by affidavit would be a sufficient compliance with the statute. No more can it be maintained that a statement containing all the statutory essentials, but with a verification of a part only of such essentials, would be sufficient. It follows, of course, that if the "times when the material was furnished" must be set forth to save the lien, the verification must be broad enough to cover that requirement. Here the dates were given in the itemized account, and the statement to which the account is attached states that the account "correctly sets forth the materials, consisting of builders'

hardware, so furnished, <sup>104</sup> and the dates when furnished," but the affidavit does not certify to the truth of the statement and account, but simply that it "contains a full and true statement of builders' hardware furnished," etc. This affidavit could be absolutely true and the dates in the statement and account wholly untrue. Such a verification would not be sufficient to a pleading necessary to be verified, and while we are not disposed to adopt a rule of construction requiring a strict compliance, we cannot dispense with a substantial compliance with the statute.

The verification here is almost literally the same as the verification set forth in *McDonald v. Rosengarten*, 134 Ill. 126, which was there held to be defective. It would be overruling that case to hold that the verification in this case is sufficient. It was said in that case that "verification, in this connection, plainly means certifying that the statement as made is true." The affidavit here does not certify that the whole of the statement is true, but only that a part of it is true. It swears that the statement is a true statement as to the hardware furnished, as to its use in and upon the property, and as to the amount due therefor, but it omits to certify that the statement is true in so far as it sets forth the times when the material was furnished. In this respect it does not comply with the statute. If the affiant had simply sworn that the statement was true, his oath would be understood as applying to the whole statement, and this case would then be brought within the rulings of this court in the recent cases of *Hayes v. Hammond*, 162 Ill. 133, and *Moore v. Parish*, 163 Ill. 93. In the latter cases, the verifications, which were held good, applied to the whole of the statement, while here the verification is clearly limited to a part of the statement.

The judgment of the appellate court and the decree of the circuit court are affirmed.

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**MECHANIC'S LIEN—CLAIM OF—DEFECTIVE AFFIDAVIT.**—A mechanics' lien claim which shows upon its face by apt and sufficient words that it is for work and materials furnished to a new building indicates its class, although it does not use the statutory phrase "erection and construction," and is sufficient: *Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note. The fact that an affidavit for a mechanic's lien described more land than would be subject to the lien will not affect the legality of the proceedings, if not fraudulent: *White Lake Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262, and note. But where the notary's jurat to the affidavit is defective, parol evidence to explain the defect is inadmissible, and the defect may be fatal to the notice of claim: *Hill v. Alliance Building Co.*, 6 S. Dak. 160; 55 Am. St. Rep. 819, and note.

## GILBERT v. WATTS-DE GOLYER COMPANY.

[169 ILLINOIS, 129.]

**TRIAL—WAIVER OF EXCEPTION.**—The defendant, by introducing evidence to contradict the case made by the plaintiff, waives an exception taken by him to the action of the court in overruling his motion made at the close of the testimony on behalf of the plaintiff to direct the jury to find for the defendant.

**TRIAL—PRESERVING SUFFICIENCY OF EVIDENCE AS QUESTION OF LAW ON APPEAL.**—A party who desires to save for consideration in the appellate court the question whether, as matter of law, the evidence was sufficient to warrant the submission of the case to the jury, must, by motion presented to the court before submitting the case to the jury, have asked the court to exclude the evidence and peremptorily direct the jury to return a verdict in his favor.

**JUDICIAL SALES—RIGHT TO POSTPONE.**—A provision in a statute authorizing a sheriff to postpone an execution sale for want of bidders does not authorize postponement on the sole ground that only one bidder is present.

**JUDICIAL SALES—POWER TO POSTPONE.**—The mere fact that the sheriff has heard, or has been unofficially advised, that there is some adverse claim of ownership to the property to be sold under execution, does not authorize him to decline to proceed with the sale.

**JUDICIAL SALES—LIABILITY FOR ARBITRARY POSTPONEMENT.**—A sheriff who arbitrarily postpones an execution sale against the objection of the plaintiff therein, when there are several bidders present, one of whom will bid sufficient to prevent a sacrifice of the property, acts without authority, and is liable to the execution plaintiff for such damages as he has sustained through such act of the sheriff.

**TRIAL—INSTRUCTIONS.**—If there is no evidence produced tending to establish circumstances which would create exceptions to a general rule, it is not error to omit all reference to such exceptions in stating the general rule to the jury.

Bliss, McKittrick & Northam and G. Gillette, for the appellant.

Bulkley, Gray & More, for the appellee.

**130** **BOGGS, J.** The appellant, by introducing evidence to contradict the case made by the plaintiff (appellee), waived the exception taken by him to the action of the court in overruling the motion, entered at the close of the testimony offered in behalf of the plaintiff, to direct the jury to find for the defendant: *Joliet etc. Ry. Co. v. Velie*, 140 Ill. 59; *Chicago City Ry. Co. v. Van Vleck*, 143 Ill. 480; *Grimes v. Hilliary*, 150 Ill. 141.

**131** Upon the final submission of the case to the jury, appellant, among other instructions to be given to the jury, presented to the court the following: "6. The court instructs the jury that, the plaintiff having failed to make out a case which in law en-



titled it to recover, you shall find your verdict for the defendant."

It is complained the court refused to grant this instruction. Before offering it, the appellant had submitted the case to the jury for decision upon the facts, thereby admitting there was a question of fact to be determined by the jury. The instruction under consideration, as was said of a similar instruction in *Peirce v. Walters*, 164 Ill. 560, "sought to take away from the jury all questions of fact, and require them to determine, as a matter of law, that there was no evidence before them tending to support the plaintiff's cause of action." "If," to quote further from the same opinion, "the defendants desired the court to pass upon the legal question as to whether or not there was any testimony before the jury tending to prove the plaintiff's case, and to bring that question before this court for review as a question of law, they should have asked to have the case withdrawn from the jury before the final submission." If the appellant in the case at bar desired to save for consideration in this court the question whether, as a matter of law, the evidence was sufficient to warrant the submission of the case to the jury, he should, by a motion presented to the court before submitting the case to the jury, have asked the court to exclude the evidence and peremptorily direct the jury to return a verdict in his favor. Such question cannot be raised by including in a series of instructions presented to the court to be given to the jury for their guidance in applying rules of law to the decision of the questions of fact raised by the evidence, an instruction declaring the evidence is not sufficient to entitle the plaintiff to recover, and directing that a verdict be returned by the <sup>132</sup> jury for the defendant: *Peirce v. Walters*, 164 Ill. 560; *Vallette v. Bilinski*, 167 Ill. 564. It was not error to refuse to grant the instruction, and such refusal presents to this court no question relating to the facts or the sufficiency thereof.

Appellant sought to introduce an instrument of writing which the witness who was called to identify it called a "copy of a notice," but the court refused to permit it to be read in evidence. The instrument in question is not preserved in the bill of exceptions, and we are unable to determine otherwise from the record the contents thereof. The only indication as to its character is, that counsel for appellant, in questions relating to it, called it a notice. It appeared, however, from the testimony of the witness who was asked to identify it that nothing whatever was done with it. It seems from the testimony it was prepared by counsel for appellant, the sheriff, at some time immediately

before or just after the sale, but after being prepared further action upon it was abandoned. We are unable to see how the mere drafting of a notice or writing by counsel for appellant had any tendency to elucidate any issue before the jury. We think it was correctly excluded.

The only complaint as to the instructions given for appellee is, that the court erred in giving those numbered 1 and 2, asked on behalf of the appellee company. They are as follows:

"1. The court instructs the jury that the plaintiff in a writ of execution has a right to control the same without interference, and the sheriff must obey his instructions. If he fails to do so, he will be liable for whatever damages are occasioned thereby.

"2. The court instructs the jury that when the defendant, the sheriff, received the writ of execution offered in evidence in this case, it was his duty to execute it without delay, according to its command; and if you believe, from the evidence, that the defendant, as such sheriff, refused to execute said writ in accordance with its command <sup>133</sup> although instructed and directed so to do by the plaintiff, and refused to make sale of the goods described therein at the time advertised, and did then and there, against the protest and objection of the plaintiff, continue said sale, then and in such case he violated his duty as an officer and is liable to the plaintiff in this action, and your verdict must be for the plaintiff for such damages, if any shown by the evidence, the plaintiff has suffered."

The only criticism of these instructions which need have attention is, that they leave out of consideration the power possessed by sheriffs to postpone a sale under certain circumstances. This criticism would be just and the omission of serious importance if the evidence tended to show any ground for the exercise by the sheriff of the power to adjourn a sale. No material conflict appeared in the evidence. The facts disclosed were, that the appellant, as sheriff, on the sixteenth day of November, 1893, received a special execution issued out of the superior court of Cook county, directing him to expose for sale a steam-engine and other articles therein named to satisfy a judgment in attachment rendered against the Birdsell Company in favor of the appellee, and that the appellant, as said sheriff, in pursuance of law, duly advertised the property for sale on the twenty-eighth day of November; that on the twenty-fifth day of November appellant was notified that an application on behalf of one Joseph P. Nye would be made to Judge Goggin, one of the judges of the superior court, on the twenty-seventh day of November, for an order postponing the sale; that such application was duly presented to

the said judge on the said twenty-seventh day of November, and that he on the same day refused to make such order postponing said sale; that the appellant was immediately, on the same day, notified by the appellee that it demanded he should proceed to sell the property on the following day, as advertised; that on the said twenty-eighth day of November—the day advertised for said sale—a number of persons <sup>134</sup> were present at the time and place of sale, among them being at least one bidder who was ready, able, and willing to bid the full sum of the demands against the property—an amount not disproportionate to the full value thereof—but that the sheriff, against the objections of the appellee then made, refused to expose the property for sale and adjourned the sale until a later day. It appeared the sheriff had been notified to appear at the time fixed for hearing the application before Judge Goggin for an order to stay or postpone the sale, and that he knew from rumor, or other unofficial source, that Nye claimed some interest in the property.

The statute with reference to the power possessed by a sheriff to adjourn a sale of personal property is as follows: "The officer may postpone such sale from time to time, not exceeding ten days at one time, whenever, for want of bidders or other good cause, he shall think it for the interest of the parties concerned": Rev. Stats., c. 77, sec. 49. At common law, a sheriff was vested with discretion to adjourn a sale if the circumstances and exigencies of the instance demanded a postponement. In the case at bar, the sheriff refused to offer the property for sale although several persons were in attendance upon the sale, one of whom, at least, it appeared, was ready and willing to bid the amount of the demands in the sheriff's hands, and although it appeared that a sale at such bid would not have resulted in a sacrifice of the property or been otherwise oppressive. The provision of our statute authorizing a sheriff to postpone a sale for want of bidders does not authorize postponement on the sole ground that only one bidder is present: *State v. Johnston*, 1 Hayw. 293. It was not, and could not be, contended the sale was continued for the want of bidders.

The fact the sheriff had heard, or been unofficially advised, that there was some adverse claim of ownership to the property preferred by Nye had no effect to authorize him to decline to proceed with the sale. He had been <sup>135</sup> notified to be present when the demand of Nye for a postponement of sale was to be presented to Judge Goggin. Presumably, he knew the result of the application, and nothing in the testimony tended to overcome this presumption. The law afforded Nye a remedy by replevin, or he



could have availed himself of a trial of the right of property under the statute by filing notice in writing with the sheriff of his claim and of his intention to prosecute the same. A sheriff is only bound to notice claims legally exhibited to him—not bare assertions and declarations: *Dunlap v. Berry*, 4 Scam. 327; 39 Am. Dec. 413.

The process held by the sheriff was a special execution commanding him to sell the articles therein specified. The mandate of the court amply protected the officer. Nothing in the evidence tended to show the sale would have resulted in a sacrifice of the property. On the contrary, it appeared a bidder was present at the sale for the purpose of bidding the full amount of all the demands against the property—a sum, in the aggregate, fairly approaching their value. Nothing in the testimony tended to indicate the interests of the parties to the writ demanded the sale should not proceed, or that any “good cause” warranted the officer in refusing to expose the property for sale. The discretion to adjourn a sale possessed by a sheriff at common law, or for “good cause” under our statute, is a legal discretion justified by the exigency of the situation—not the exercise of an arbitrary preference as to the course the officer will pursue. The execution plaintiff had the right to control the writ, in the absence of a sufficient legal reason for postponing the sale. The evidence developed no such legal cause.

We find in the record no evidence upon which to base an instruction advising a jury as to the exceptions to the general rule the plaintiff in an execution has the right to control the same. Where no evidence is produced tending to establish circumstances which would create exceptions to a general rule, it is not error to omit all reference <sup>126</sup> to the exceptions in stating the rule to a jury: *Selleck v. Selleck*, 107 Ill. 389; *Kellogg v. Boyden*, 126 Ill. 378.

No other alleged errors are discussed in the brief. The judgment of the appellate court is affirmed.

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**JUDICIAL SALES—POWER OF OFFICER TO POSTPONE SALE.**—An officer intrusted by law with the execution of process requiring the sale of property for the payment of debts of the owner, is necessarily, and without the aid of any statute, invested with a large discretion to prevent a sacrifice of the property. Hence, where such sale is likely to produce an unusual sacrifice, owing to combinations among bidders, or to the absence of competition, or other like cause, he may undoubtedly adjourn the sale or return the property unsold for want of bidders: *Extended note to Russell v. Richards*, 26 Am. Dec. 536. Such adjournment may be made without giving further notice: *Hosmer v. Sargent*, 8 Allen, 97; 85 Am. Dec. 683; and the officer may be held liable for an abuse of his dis-

cretion in postponing the sale: *Extended note to Russell v. Richards*, 26 Am. Dec. 536.

**INSTRUCTIONS.**—A judgment will not be reversed for the refusal to instruct the jury on propositions of law not involved in the case upon the evidence before the court: *Arneson v. Spawn*, 2 S. Dak. 269; 39 Am. St. Rep. 783; *Boyd v. Insurance Co.*, 90 Tenn. 212; 25 Am. St. Rep. 676.

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## KELLER v. BADING.

[169 ILLINOIS, 152.]

**MORTGAGES—CONDEMNATION PROCEEDINGS—MORTGAGEE'S LIEN.**—A mortgagee, not a party to condemnation proceedings involving part of the mortgaged premises, has a lien upon the fund derived from such proceedings equal to the lien of the mortgage, and an equity therein superior to that of subsequent judgment creditors of the mortgagor.

**MORTGAGES—CONDEMNATION PROCEEDINGS—BILL TO COMPEL APPLICATION OF FUND.**—If a fund derived from the condemnation of mortgaged property is in the hand of a third party, who refuses to pay it to either of the parties to the mortgage, for the reason that it is claimed by a judgment creditor of the mortgagor, a court of equity will entertain a bill to determine the rights of the parties and order the fund paid over.

**COSTS.**—ON A BILL IN EQUITY to compel a third party to pay to the mortgagee a fund arising from condemnation of the mortgaged property, and claimed by a judgment creditor of the mortgagor, such judgment creditor is liable for the costs if he unsuccessfully contests the right of the mortgagee to a decree.

Bill in equity to compel the distribution of a fund arising from the condemnation of mortgaged premises. William Bading and wife, the appellees, were the owners, as cotenants of a certain lot occupied as a homestead. They mortgaged this property to one Wagner, to secure the payment of five hundred and fifty dollars, and one Caroline Leistikow held this note and mortgage by assignment. Subsequently to the mortgage the Metropolitan West Side Railroad Company caused a part of such lot to be condemned, and paid the damages assessed against it, amounting to five hundred and fifty-three dollars and sixty-five cents, to the county treasurer. Subsequently to the mortgage and before condemnation, J. M. Keller and others obtained a judgment against Bading and wife for three hundred and fourteen dollars and fifty cents. Bading and wife authorized the treasurer to pay the fund in his hands to Caroline Leistikow, but as Keller and others claimed the fund the treasurer refused to pay it over. Bading and wife filed this bill. A demurrer by Keller and others was overruled and a decree rendered ordering the money paid to Caroline Leistikow to be applied on her mortgage,

the defendants to pay the costs. They appealed. The decree was affirmed in the appellate court, and they then appealed to this court.

C. E. Cruikshank and F. H. Atwood, for the appellants.

E. Saunders, for the appellees.

154 PHILLIPS, C. J. The money arising from proceedings condemning a part of appellees' lot belonged to them to the extent of their interest in the land as tenants in common, subject to the interest of the mortgagee. The mortgagee, by virtue of her mortgage, had a lien on the entire lot, and by the condemnation of a part of the lot her equitable interest therein was not destroyed, she not being a party to that proceeding, and her lien on the fund derived therefrom is equal to her lien on the mortgaged premises. Her equity therein is superior to that of a subsequent judgment creditor, and she was entitled to have the money paid to her: *Colehour v. State Sav. Inst.*, 90 Ill. 152. It was to the interest of appellees to have the money paid to her and thereby have their mortgage indebtedness paid. It was money they had a right to have applied, and, when the county treasurer refused to pay it over, they had a right to file this bill and have the court determine the rights of the parties to the fund and order it paid over. It is not a case of equal equities between two creditors, one of whom has security on two funds, but a case of a superior equity on a fund which the interest of the debtor requires to be paid to whoever was entitled thereto, and such debtors had a right to bring all the parties in interest before the court and have their rights determined. The claim asserted by appellants to this fund rendered the filing of this bill necessary on the part of appellees. Appellants did not disclaim, but by their demurrer denied the right to relief. They were actively contesting the right of appellees to have a decree, and the costs were properly awarded against them.

We find no error in this record, and the judgment of the appellate court for the first district is affirmed.

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MORTGAGE—TAKING MORTGAGED PREMISES UNDER EMINENT DOMAIN—RIGHTS OF MORTGAGEE.—The owner of a limited interest in property taken under eminent domain is entitled to compensation in proportion to his interest: *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447. The mortgagee of land taken by a city for a public street may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor: *Sherwood v. Lafayette*, 109 Ind. 411; 58 Am. Rep. 414.

COSTS—RIGHT TO, IN EQUITY.—Costs are not a matter of right in equity, but may be awarded or withheld in the discretion of the



chancellor: *Pile v. Pedrick*, 167 Pa. St. 296; 46 Am. St. Rep. 677, and note. Where both parties are in fault, costs will not be allowed to either: *Saunders v. Frost*, 5 Pick. 259; 16 Am. Dec. 394, and extended note. A bona fide purchaser will not be charged with complainant's costs when he defends against a suit brought to recover the property purchased and fails: *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271.

## SANITARY DISTRICT OF CHICAGO v. COOK.

[169 ILLINOIS, 184.]

**FIXTURES—WAIVER BY TENANT OF RIGHT TO REMOVE.**—If, at the expiration of a lease, during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease cannot be removed by the tenant during or at the end of the new lease, although his actual possession of the premises has been continuous.

**FIXTURES—ESTOPPEL.**—An admission by the attorney for a landlord that the latter does not intend to claim fixtures on the leased premises does not estop him from claiming them, if such admission is withdrawn before it is acted upon, and the ownership of the fixtures is thereafter treated as a disputed question by all of the parties.

Contest over a fund arising from condemnation proceedings. Through condemnation proceedings carried on in 1892, the Sanitary District of Chicago acquired the right to certain premises belonging to J. A. Cook, on which there were buildings and improvements erected by T. and S. Piper while they were tenants of such property. The Sanitary District settled with the Pipers while these proceedings were pending. They terminated in awarding to the owner of the property the sum of forty-three thousand eight hundred and forty-five dollars, and a finding that the value of the improvements on the land was fifteen thousand five hundred and seventy-five dollars and sixty cents. This last amount is the fund in controversy. In October, 1893, Cook served notice on the district that he would on a certain day ask for an order requiring the money to be paid to him, claiming to be entitled thereto. By consent of the parties, the case was referred to a referee to take proof and report to the court his conclusions of law and fact. The improvements in question consisted of a large stable and hay barn, dwelling, corncrib, cowhouse, some fences, a well, pump, and drinking trough. The evidence before the referee showed that these improvements were put on the land prior to 1883 by the Pipers. The barn was constructed on telegraph poles set in the ground,

to which the lumber was attached. The stable was made on scantlings set in the ground, and these buildings could not be removed without tearing them to pieces. The Pipers placed these improvements upon the property while they held it under a lease prior to 1883. In the latter year, their lease having expired, they took a new lease of the premises. It was extended from time to time until the district took possession under the condemnation proceedings. This lease did not reserve the improvements to the tenants. During the time that negotiations were pending between the Sanitary District and Cook and the Pipers, in regard to acquiring their interests in the premises, the attorney for the Pipers disclaimed ownership of the improvements. The attorney for Cook also at first disclaimed such ownership, but after seeing the lease did claim them, and the jury made a separate finding as to their value. The Sanitary District made a settlement with the Pipers and took a quitclaim deed of all their interest in any buildings situated on the land of Cook and in the leasehold of said land. Nothing was allowed in this settlement for such improvements, but the district claims the money by virtue of such settlement and its quitclaim deed. The referee found that the improvements were attached to the freehold and erected with the intention of their becoming fixtures; that by reason of the second lease without any reservation of them they became real estate; that there was no estoppel against Cook by reason of the admissions of his attorney that the value of such improvements was not included in the settlement between the Sanitary District and the Pipers, and that Cook was entitled thereto. The findings of the referee were objected to. Judgment entered in favor of the Sanitary District. Cook appealed, and the appellate court reversed the judgment and remanded the case, with instructions to enter judgment for Cook. The Sanitary District then appealed to this court.

F. W. C. Hayes and S. Jones, for the appellant.

A. B. Wells, for the appellee.

189 CARTER, J. As the appellate court made no finding of facts in its judgment of reversal, we must assume that it found the facts to be as found by the circuit court. Appellant here contends that, as no propositions to be held as law in the decision of the case were submitted to the trial court, no questions of law are presented here, and, as all questions of fact have been finally settled, nothing can be done by this court but to affirm the judgment.

We are of the opinion that the report of the referee of his

conclusions of law and fact under the statute, and the objections and exceptions to that report, raised for decision all such questions of law as fully as could have been raised by propositions of law had they been presented. The statute provides that the referees "shall have authority to take testimony in such cause, and report the same in writing, together with their conclusions of law and fact, to the court," and that either party may except to such report. Appellant itself filed eight exceptions to the report, raising questions of law, which were sustained by the court in overruling the recommendations of the referee and rendering judgment for the district. Under the statute, parties can raise, by exceptions, any question of law for decision as readily as by submitting propositions to be held as law. There was but little dispute as to the evidence.

The only questions of law raised relate: 1. To the effect of the subsequent leases of Cook to the Pipers of the premises containing the buildings, etc., after the <sup>190</sup> expiration of the lease under which such buildings were erected by the Pipers; and 2. To the question whether or not Cook was estopped from claiming these improvements by the declarations of his attorney disclaiming his ownership.

Conceding that it is settled by the evidence that the Pipers erected the buildings, etc., on the leased premises while holding under a former lease, as agricultural or trade fixtures, and had the lawful right to remove and retain them while holding under such former lease, the question remains whether such right was not lost by the expiration of such lease without such removal, and the taking of the subsequent leases in evidence which contained no reservation of such right, but, on the contrary, contained the covenants before set out binding the lessees to keep up the fences, to keep the premises in good repair, and to deliver up the same in as good condition as they were when entered upon. The record does not show the contents of the original lease.

We have been cited to no case, and know of none, in which the precise question here presented has been considered by this court. In *Mason v. Fenn*, 13 Ill. 525, 529, it was said: "As between landlord and tenant, improvements put on the demised premises by the latter for purposes of trade or manufacture, and which can be detached without material injury to the estate, may be removed by him before he quits the possession." As to this proposition there can be no doubt. But the great weight of authority seems to be that where, at the expiration of a lease during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises containing



no reservation of any right or claim of the tenant to the fixtures still remaining on the premises and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease cannot be removed by the tenant during or at the end of the new lease, notwithstanding <sup>191</sup> his actual possession of the premises has been continuous: *Fitzherbert v. Shaw*, 1 H. Black. 258; *Heap v. Barton*, 74 Eng. Com. L. 12 C. B. 273; *Sharp v. Milligan*, 23 Beav. 419; *Thresher v. Water Works Co.*, 2 Barn. & C. 608; *Merritt v. Judd*, 14 Cal. 59; *Loughran v. Ross*, 45 N. Y. 792; 6 Am. Rep. 173; *Watris v. First Nat. Bank*, 124 Mass. 571; 26 Am. Rep. 694; *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467; *Hedderick v. Smith*, 103 Ind. 203; 53 Am. Rep. 509; *Marks v. Ryan*, 63 Cal. 107; *Taylor on Landlord and Tenant*, sec. 552; *Ewell on Fixtures*, 174, 175; *Tyler on Fixtures*, 437-439; *Wood on Landlord and Tenant*, sec. 532. The reason given is, "because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterward estopped from denying."

The only cases contra are *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, and *Second Nat. Bank v. Merrill Co.*, 69 Wis. 501. In *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, leases had been executed for a certain term, all expiring on the same date, in which leases there was a provision allowing the lessees time for the removal of the buildings they might erect. Afterward, the lessor having sold his real estate to another, a new lease was taken from the vendee to expire at the same time as the former leases, and no reason appeared for doing so, unless it was to obtain some lots not included in the old leases. Judge Cooley, after stating the rule that the tenant must remove trade fixtures during the term, or while he still has a right to regard himself as occupying in the character of tenant, before surrendering possession, in delivering the opinion of the court said: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly <sup>192</sup> be more absurd than a rule of law which should, in effect, say to the tenant who is about to obtain a renewal, 'If you will be at the expense and trouble and incur the loss of removing your erections during the term,

and of afterward bringing them back again, they shall be yours, otherwise you will be deemed to abandon them to your landlord.'” He then cited *Merritt v. Judd*, 14 Cal. 59, and proceeded to review the authorities therein cited to show that they do not bear out the decision of the California court. However, the case of *Thresher v. East London*, 2 Barn. & C. 608, which he distinguishes, is directly in point in the case at bar. That case, he said, “was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., to leave and yield up,” etc. In commenting on *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, he used the following language: “The case of *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, is in accord with the case in California. In that case Mr. Justice Allen, speaking for the majority of the court, says: ‘In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises.’ This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include <sup>193</sup> them unless, from the lease itself, an understanding to that effect is plainly inferable.”

The supreme court of Wisconsin, in the case of *Second Nat. Bank v. Merrill Co.*, 69 Wis. 501, cited *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, with approval. Still, in the opinion it was said: “For the reason that the great preponderance of the evidence in this case clearly shows that it was understood that the tenant’s right to his fixtures and machinery should remain in him, notwithstanding the acceptance of a new lease, and because there is nothing in the terms of the new lease which must necessarily be construed as a letting by the landlord to the tenant of such fixtures and machinery and an acceptance by the tenant of a lease of the same, with a covenant to return them to the landlord at the end of the lease, we think the right of the ten-

ant to remove the trade fixtures and machinery placed upon said premises by him has not been lost, that such fixtures and machinery are still owned by him and that he has a right to remove the same." In another part of the opinion the court said: "If he [the tenant] accepts a lease which in express terms recognizes the right of the landlord to the fixtures, and he agrees to pay rent for their use thereafter, and keep them in repair, and surrender their possession at the end of the new term, a strong case would be made out in favor of a surrender of the fixtures to the landlord by the acceptance of such new lease, and it would require very clear evidence that, notwithstanding the acceptance of such new lease, there was an agreement that the title to the fixtures should remain in the tenant. If it should be admitted that the general words of description in the new lease would, under ordinary circumstances, be a lease of the fixtures as well as of the land and buildings, still, the lease only raises a presumption that it was intended to cover the fixtures, and it is open to proof whether it was in fact intended to cover such fixtures, or whether they were intended by both parties to be excepted therefrom."

<sup>194</sup> In *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, the doctrine of *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, as stated in the opinion of Judge Cooley, is disapproved in the following language: "We cannot go along with him in his reasoning. We are not able to discover anything 'absurd' in the rule laid down by the other authorities. . . . If it was the intention of the parties in this or any other similar case that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect; and it seems to us reasonable to infer from the absence of such a clause that it was their intention that this right should no longer continue. . . . We neither know of, nor can we recognize, any 'public policy' which ought to induce the courts to place a different construction or give a different effect to a lease between landlord and tenant from that given to other contracts between other parties, or to set aside a well-settled rule or principle of law in order to promote the interests of either party thereto." In this case the terms of the lease were: "The premises known as the City Hotel, . . . together with all the rights, appurtenances, and privileges thereunto belonging or in anywise appertaining," and the court said, in construing the same: "We take it to be clear that the descriptive terms in this lease are sufficient to convey to the lessee the fixtures in dispute, if they had been previously placed upon the premises by the landlord, or had been left there by a previous outgoing tenant. There is, it is true, no ex-



press covenant on the part of the lessee to keep the premises in repair and to restore them in good condition."

The Texas court of civil appeals, in *Wright v. Macdonnell* (May 23, 1894), 27 S. W. Rep. 1024, quotes the general rule, and says that *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, answers and completely overthrows Judge Cooley's position. But the supreme court of Texas, on appeal, in the same case (*Wright v. Macdonnell*, 88 Tex. 140), while conceding the rule as established by the weight of authority, inclines to the Cooley theory, and says: "The opinion <sup>195</sup> of Judge Cooley in the former case is an able presentation of that side of the controversy, and is very difficult to answer. . . . But, as we view the case before us, it is not necessary for us to determine the naked question. The rule recognized by the majority of the courts is neither inflexible nor arbitrary. It must yield to the intention of the parties to the lease as deduced from the language employed, when viewed in the light of the circumstances attending the transaction."

In *Marks v. Ryan*, 63 Cal. 107, the case of *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, is cited, but the court, after citing *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, and *Ewell on Fixtures*, 174, followed the weight of authority, and adhered to the doctrine of its former decisions as laid down in *Merritt v. Judd*, 14 Cal. 60, and *Jungerman v. Bovee*, 19 Cal. 355.

We see no reason for departing from the general common-law rule, and must hold that the Pipers lost their right to the improvements by accepting the new leases, and that they did not pass to the sanitary district by the quitclaim deed. Besides, the covenants in the new leases would seem to put the question in this case beyond the realm of reasonable controversy.

Even if it be conceded that the attorney of Cook had authority to bind him by the representations or admissions made to the attorney of the district that Cook had no claim to the improvements, still, as the statement was corrected and withdrawn before appellant had acted upon it to its prejudice, and by the later action of both parties on the trial in the condemnation proceedings the ownership of the improvements was treated as a disputed question, to be left for future determination, we see no ground from which an estoppel against Cook could arise.

The judgment of the appellate court is affirmed.

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**FIXTURES AS BETWEEN LANDLORD AND TENANT.**—The right of a tenant to remove trade fixtures does not extend to the term of a new lease not providing for the removal; *Hedderich v.*

Smith, 103 Ind. 203; 53 Am. Rep. 509. The right of a tenant from year to year to remove fixtures placed by him on the demised premises is lost, where, subsequently, and during the tenancy, he receives notice to quit at the end of the current year, and does not so do, but obtains and accepts from his landlord a written lease of the premises, "together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining for a term of five years, but containing no reservation of the right to remove the fixtures then on the premises: Carlin v. Ritter, 68 Md. 478; 6 Am. St. Rep. 467, and note. See extended note to Holmes v. Tremper, 11 Am. Dec. 241-244, on when a tenant may remove fixtures.

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## CURTIS v. TRACY.

[169 ILLINOIS, 233.]

**CORPORATIONS—LIABILITIES OF DIRECTORS.**—A director of a corporation who takes part in meetings held before the recording of the final certificate of incorporation, at which additional security is voted to him for certain notes executed to him prior thereto and before he became a director, is estopped from holding the original directors liable upon the notes as partners on the ground that they exercised corporate functions before recording the certificate of incorporation. It was as much his duty as that of the original directors to see that such certificate was recorded, and he cannot enforce against them a penalty which he has incurred by his own conduct.

**CORPORATIONS—LIABILITY OF DIRECTORS.**—One who has acted as a director of a corporation, and participated in the management of its affairs, attending its meetings, and voting upon questions affecting its interests, before the certificate of its organization has been recorded as required by law, is estopped from enforcing against other directors a liability based exclusively upon their failure to record such certificate which he has failed to have recorded.

E. A. Sherburne, for the appellant.

Ullman & Hacker and Pope & Small, for the appellees.

**233** MAGRUDER, J. This is an action brought to the July term, 1895, of the superior court of Cook county, against the appellees, seeking to hold them liable as partners upon four promissory notes, executed by the Central Illinois Coal Company, all dated April 16, 1884, amounting altogether to \$20,000, two for \$10,000 due in six months from date to the order of Tracy, Beekman & Co., a firm, of which appellee, Tracy, was a member, and two for \$10,000 due in twelve months from date to the order of the First National Bank of Springfield, Illinois, of which bank appellee, Tracy, was the president. Charles H. Curtis, the plaintiff's testator, became the owner of these notes by **234** indorsement thereof for the payees by Tracy about October 16, 1884, about the time of the maturity of two of the notes, and six

months before the maturity of the other two. Of the three appellees Frank W. Tracy and A. B. Meeker filed pleas to the declaration, and Charles A. Starne was defaulted. The case was tried in the trial court before the judge without a jury by agreement, and finding and judgment were for the defendants. This judgment has been affirmed by the appellate court, and the present appeal is from such judgment of affirmance.

Plaintiff introduced in evidence articles of incorporation of the Central Illinois Coal Company, showing application for license to open books of subscription to the capital stock of the company, which was to be \$1,000,000 in shares of \$100 each; object, to mine and sell coal and coke; location of principal office, Chicago; duration, fifty years; signed and acknowledged June 15, 1883; also showing the license from the secretary of state as applied for, the report of the commissioners setting forth subscriptions for 4,860 shares at \$486,000 by A. B. Meeker, for 2,570 shares, \$257,000, by Frank W. Tracy, and for 2,570 shares, \$257,000, by Charles A. Starne, the meeting of the subscribers pursuant to notice, and election of the said Meeker, Tracy, and Starne as directors for three years, which report was sworn to by two of the commissioners on June 29, 1883, and filed in the office of the secretary of state on June 30, 1883; also showing the certificate of organization of the secretary of state dated June 30, 1883.

It was agreed that the defendants were the same persons who subscribed the capital stock of the company, and that the final certificate of organization was not filed for record in the recorder's office of Cook county until June 5, 1885.

Defendants offered in evidence a chattel mortgage dated April 16, 1884, executed by the Central Illinois Coal Company to secure the payment of said notes, running <sup>235</sup> to James Matheny, Jr., as trustee, conveying certain leasehold interests in mining lands in Kankakee county, acknowledged and recorded in Kankakee county on April 22, 1884; also a book of records of the company, certain ballots for directors, minutes of a meeting of directors, the twenty bonds and four certificates of stock hereinafter mentioned, and also certain papers showing the assignment by Frank W. Tracy on April 16, 1884, of his shares of stock to said Meeker and Starne.

The evidence of the defendants showed the following facts: There was a meeting of the stockholders of the company on October 22, 1884. C. H. Curtis, plaintiff's testator, was chairman of that meeting, which proceeded to the election by ballot of two additional directors, and 3,798 shares of stock out of 4,458 shares then present, were voted for C. H. Curtis and G. W.



Meeker, who were declared elected as directors. At that election the chairman, C. H. Curtis, voted ten shares of stock. The meeting of the stockholders then adjourned, and immediately there was a meeting of the directors, at which C. H. Curtis, A. B. Meeker, G. W. Meeker, and C. P. Wheeler were present, and at which, on motion of A. B. Meeker, it was voted to deliver to C. H. Curtis \$20,000 in bonds and 400 shares of the capital stock of the company, as collateral to the mortgage of the company, made on April 16, 1884, to James H. Matheny, Jr., which mortgage had been purchased by C. H. Curtis. The twenty bonds were each for \$1,000, dated May 1, 1884, payable in twenty years to the order of a trust company in New York, and signed by the vice-president and secretary of the Central Illinois Coal Company with the seal of the company attached, and secured by a trust mortgage to said trust company upon all the property of the coal company. The 400 shares of stock were evidenced by four certificates to C. H. Curtis, each for 100 shares of \$100 each, dated October 22, 1884, signed by A. B. Meeker, as president, and C. P. Wheeler as secretary, with the seal of the company attached, and <sup>236</sup> countersigned and registered by the secretary on the same day.

It was conceded that the estate of C. H. Curtis, deceased, held the bonds and stock as collateral to the notes in suit.

The contention of the plaintiff, arising upon exceptions to the admission of evidence and upon the refusal of propositions of law submitted to the court, is, that as the notes sued upon were made in the name of the corporation on April 16, 1884, and the certificate of organization was not recorded until June 5, 1885, the defendants, as directors, assumed to exercise corporate powers without complying with the provisions of the incorporation act, and are, therefore, liable to pay the notes as partners under sections 4 and 18 of that act: 1 Starr and Curtis' Annotated Statutes, 610, 617.

We have recently considered the liability of officers and directors of a corporation, under said sections 4 and 18, to creditors who are third persons: *Loverin v. McLaughlin*, 161 Ill. 417. In the *Loverin* case a distinction was said to exist between cases where a stockholder is a party to the suit, and cases where the contest is between third persons and the officers or directors assuming to exercise corporate powers. In the case at bar, C. H. Curtis, plaintiff's testator, was a stockholder in the company at or near the time when he became the owner of the notes sued upon, and not only so, but he was elected as a director of the company and transacted business for the company as such di-

rector before the certificate of organization was recorded as required by section 4. While acting as a director of the company, he accepted 400 shares of the capital stock as security for the very debt here sought to be recovered. It is true that the notes were not made while he was director, but, after he became director, he recognized the debt as an obligation of the corporation by taking part in proceedings by the board of directors by which the debt was further secured. Being <sup>237</sup> already a stockholder and director, he accepted additional certificates of stock, issued to him as security for these notes. This was done on October 22, 1884, and the certificate of organization was not recorded until June 5, 1885. It was as much his duty to see to it that the certificate was recorded as it was the duty of the original board of directors, elected by the first meeting of the subscribers: *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67. By acting with the other directors in the meeting of October 22, 1884, he assumed to exercise corporate functions before that provision of the act which required the certificate to be recorded had been complied with. He is estopped by his conduct from seeking to enforce the liability provided for in section 18 against the defendants. He cannot enforce against others a penalty which he has himself incurred by his own conduct.

It is well settled that a stockholder cannot defend against a liability which rests upon him for the benefit of corporate creditors, upon the ground that the corporation was not legally organized by reason of noncompliance with the terms of the statute providing for such an incorporation: *Hickling v. Wilson*, 104 Ill. 54. He is estopped by the act of subscribing for the stock from setting up such a defense. Upon principle, there can be no difference between such a case and a case where a stockholder, who is also a director, seeks to enforce a claim resting for its validity upon the fact that the corporation in which he is such stockholder and director was not organized in accordance with the statute. Where a man has acted as a director of a corporation, and participated in the management of its affairs, and attended its business meetings, and voted upon questions affecting its interests, before the certificate of its organization has been recorded as required by law, he should be estopped from enforcing against others a liability based exclusively upon their failure to record the same certificate which he failed to have recorded.

<sup>238</sup> Under the facts as herein recited, we think that the judgments of the superior court of Cook county and of the appellate court were correct. Those judgments are accordingly affirmed.

**CORPORATIONS—DIRECTORS—WHEN PERSONALLY LIABLE ON CORPORATION CONTRACTS—ESTOPPEL.**—The personal liability of directors on contracts entered into on behalf of the corporation is governed by the ordinary law of principal and agent. If they fail so to contract as to bind the principal, they bind themselves. If, before, the corporation is fully organized, they enter into a contract as directors, they are personally bound: Monographic note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 649, on the liabilities of directors of corporations. It has been enunciated as a general rule that the directors of a corporation have no authority to bind the company to any contract made with themselves personally: Note to *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 471. See monographic note to *Beach v. Miller*, 17 Am. St. Rep. 298-308. It is true that a corporation which has failed to file its articles of incorporation has no valid existence as a *de jure* corporation: *Capps v. Hastings Prospecting Co.*, 40 Neb. 470; 42 Am. St. Rep. 677; but one who participates in the actions of a *de facto* corporation, or deals with it, may so act as to be estopped from contesting the regularity of its formation: See *Pittsburg etc. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and note; *Marshall Foundry Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539; note to *Rutherford v. Hill*, 29 Am. St. Rep. 600-603, on the personal liability of persons acting as a corporation but without authority.

## **MUTUAL RESERVE FUND LIFE ASSOCIATION v. SMITH.**

[169 ILLINOIS, 264.]

**APPELLATE PRACTICE—AMOUNT INVOLVED.**—If the dismissal of an appeal by the intermediate appellate court leaves the judgment of the inferior court in full force to the effect that the matter involved is a subsisting conditional obligation for the payment of five thousand dollars, the amount in controversy exceeds one thousand dollars, the amount required by statute, and an appeal lies to the supreme court.

**JUDGMENTS—FINAL—WHAT ARE.**—A final judicial determination of a collateral matter distinct from the general subject of litigation affecting only the parties to that particular controversy, is a final judgment and may be appealed from.

Gratty Brothers, Jarvis & Cleveland and G. Burnham, Jr., for the appellant.

A. R. Urion and A. B. Stratton, for the appellee.

<sup>264</sup> **BOGGS, J.** This is an appeal from a judgment of the appellate court dismissing an appeal taken by the appellant from a decree of the circuit court of Cook county. Appellee <sup>265</sup> entered a motion in this court to dismiss the appeal to this court. The grounds of this motion are, the judgment of the appellate court was not a final judgment, and the amount involved is less than one thousand dollars. The motion was reserved to the hearing.

The contention between appellee and the appellant association was whether a policy issued by the association upon the life



of appellee, in the sum of five thousand dollars, had been forfeited or was a binding obligation of indemnity. The order or decree of the circuit court was that the policy was a subsisting conditional obligation against the association in that sum. A contrary ruling of the circuit court would have deprived the appellee of the benefit of the undertaking of the association to pay that sum. The dismissal of the appeal by the appellate court left the decree of the circuit court standing in full force and effect. It is clear, therefore, that more than one thousand dollars was involved in the controversy.

The judgment of the appellate court that the appeal be dismissed is a final, appealable judgment. A final judgment means, not a final determination of the rights of the parties with reference to the subject matter of the litigation, but merely of their rights with reference to the particular suit. It is not at all necessary that the judgment should be upon the merits, if it definitely puts the case out of court. It is the termination of the particular action which marks the finality of the judgment. A judgment of nonsuit or dismissal is final: 1 Black on Judgments, sec. 21; *Ross v. Evans*, 30 Minn. 206. In *Moore v. Williams*, 132 Ill. 591, the court had before it an appeal from the judgment of the appellate court dismissing the appeal to that court, and fully recognized the judgment of the appellate court as being a final judgment, but dismissed the appeal for the reason the amount involved was less than one thousand dollars. In *Zuckerman v. Hawes*, 146 Ill. 59, this court entertained an appeal from a judgment of the appellate court dismissing an appeal to that court and <sup>266</sup> reversed the judgment of the appellate court. The motion to dismiss the appeal in this court must be and is overruled.

This brings the correctness of the judgment of the appellate court into review in this court. The judgment of the appellate court is, that "the motion to dismiss the appeal for want of jurisdiction coming up to be heard, the court, being fully advised in the premises, doth order said appeal to be, and the same is hereby, dismissed, and that the appellee recover from the said appellant his costs in this behalf expended, to be taxed, and that he have execution therefor." In what respect it is supposed the court was lacking in jurisdiction is not developed by the record. Counsel for the respective parties agree that the ground of the motion and of the action of the appellate court was that the order or decree of the circuit court was not a final order or decree. It is apparent that the appellate court is in all other respects possessed of full power and jurisdiction to entertain the appeal.

Whether the decree of the circuit court was a final decree becomes, therefore, the material question to be determined by this court.

The appellee and a number of others, as complainants, had pending in the circuit court a proceeding in chancery, the prayer of which was that the appellant association should be restrained by the decree of the court from collecting, by way of assessments upon its policy holders, sums of money to be devoted to the creation of an alleged unlawful permanent reserve fund, and that the assessments of the complainants might be paid out of the reserve fund now, as the bill alleged, illegally in the possession of the association, or that such alleged illegal reserve fund should be distributed among the policy holders of such association, and that, pending a hearing of the case, a temporary injunction might be awarded the complainants restraining the association from declaring the policies lapsed, in order that the same may stay in <sup>267</sup> full force and effect until the court could determine the case. The motion for a preliminary injunction was heard and denied, and the complainants and the association, on December 30, 1895, in view of the fact that the failure to pay the assessments during the pendency of the suit might result in forfeiture of the policies, entered into a stipulation providing for the payment of the assessments to one of the solicitors for the association, to be by him held and disposed of according to the final decree of the court. On the thirteenth day of March, 1896, some two and a half months after the stipulation had been entered into, during all of which time appellee had made no payments thereunder but was in default under the agreement, he made application to the court to have the stipulation permitting the payment of accrued and accruing assessments to the solicitor extended, so as to permit him to pay his assessments at that time and have the benefit of the provisions of the stipulation. The court required the appellant to answer this application, and afterward heard the testimony of the respective parties and entered a decree declaring that the policy of appellee should not be regarded as forfeited for non-payment according to the terms of the stipulation, and that the association should reinstate him to all the rights and privileges accorded him by the stipulation, upon payment by him of all assessments due up to that date, with legal interest thereon.

The court had refused to restrain the collection of the assessments during the pendency of the suit, and the parties to the litigation, in view of such refusal of the court, entered into the stipulation providing for the payment of such assessments to a designated third party, to be by him held until the case should

be determined, and then to be paid by him to the party entitled to receive the same under the decree. The appellee did not comply with his undertaking in the stipulation, and insisted that reasons existed why the court should relieve him from the consequences attending his default. The stipulation and its <sup>268</sup> provisions, and the duties and obligations of the parties, were distinct from the general subject of the litigation. Only the appellee and the appellant association were parties to the controversy. The numerous other parties to the litigation were in nowise interested in or affected by its determination. The decree of the court appealed from finally disposed of the questions involved in it, and the litigation of the issues arising under the original pleadings in the case proceeded wholly unaffected by it. The decree was the determination of a matter distinct from the general subject of litigation, and finally disposed of all of the questions involved in such distinct and separate controversy.

In *Terry v. Sharon*, 131 U. S. 46, it was said: "The term 'final decision,' in said statute under consideration, does not mean, necessarily, such decisions or decrees only which finally determine all the issues presented by the pleadings; that while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy." The same doctrine is announced in 2 *Beach's Equity Practice*, section 948, and also in *Black on Judgments*, section 21. In *Evans v. Dunn*, 26 Ohio St. 439, a decree which completely and finally disposed of a branch or part of a cause which was separate and distinct from other parts of the cause was held to be a final decree. The doctrine is recognized in *Hemphill v. Collins*, 117 Ill. 396.

We are constrained to the view that the decree of the circuit court was final, and that the appellate court erred in dismissing the appeal from it. The judgment of the appellate court must be and is reversed and the cause remanded to that court, with instructions to overrule the motion to dismiss the appeal.

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**APPEAL — JURISDICTION — AMOUNT INVOLVED.**—If the amount involved in an action was greater than one thousand dollars, and an appeal was taken to the appellate court where the judgment was reduced below that sum, and an appeal was then taken by the appellant to the supreme court, the latter has jurisdiction though the decision of the appellate court has reduced the amount in controversy to a sum less than one thousand dollars: *Chicago etc. R. R. Co. v. Davis*, 159 Ill. 53; 50 Am. St. Rep. 143. If the jurisdiction of an appellate court is limited to actions in which the amount in con-



troverſy exceeds three hundred dollars, the action of a trial court in awarding plaintiff costs for leſs than that ſum cannot be reviewed upon appeal: *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87.

**JUDGMENT—WHEN FINAL AND APPEALABLE.**—A judgment is not final unleſs it is complete and definite in its nature, and a valid and ſubſiſting obligation: *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156, and note. A judgment is final ſo as to permit an appeal therefrom, though the costs have not been taxed or allowed: *Williams v. Wait*, 2 S. Dak. 210; 39 Am. St. Rep. 768. See *Arnold v. Sinclair*, 11 Mont. 556; 28 Am. St. Rep. 489, and note. As to when an appeal may be taken from an order of court, ſee note to *Holloway v. Holloway*, 10 Am. St. Rep. 349; *Harrison v. Lebanon Waterworks*, 91 Ky. 255; 34 Am. St. Rep. 180, and note.

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## RODEMEIER v. BROWN.

[169 ILLINOIS, 347.]

**DEEDS—DELIVERY.**—A physical transfer of a deed from the grantor to the grantee is not abſolutely eſſential to delivery. Other acts, accompanied with a clear intent to paſs the title from one to the other, are equally efficacious in eſtabliſhing a delivery.

**DEEDS—DELIVERY.**—If a grantee to whom an undelivered deed has been made has been in poſſeſſion of the land conveyed for a number of years with a knowledge of the exiſtence of the deed, and has paid all taxes, made valuable improvements, and conformed to the terms of the deed, and the grantor, when about to die, points to the deed and requeſts a byſtander to deliver it to ſuch grantee, this is a good delivery, although it is not actually delivered until after the grantor's death.

**DEEDS — DELIVERY — EQUITABLE ESTOPPEL.**—If a father, upon executing a deed to his ſon, permits him to take poſſeſſion of the land, pay taxes, make improvements, and pay a ſtipulated ſum each year to the grantor as provided in the deed for a number of years, up to the time of the grantor's death, this conſtitutes an equitable eſtoppel againſt the other heirs to claim that there has been no delivery of the deed.

**DEEDS — DELIVERY — PRESUMPTION.**—A ſtronger preſumption prevails in favor of the delivery of a deed in caſe of a voluntary ſettlement than in an ordinary caſe of bargain and ſale.

**DEEDS—DELIVERY—VOLUNTARY SETTLEMENTS.**—In caſe of a voluntary ſettlement, the mere fact that the grantor retains the deed in his poſſeſſion is not concluſive againſt its delivery, if there are no other circumſtances beſides the fact of his retaining it to ſhow that it was not intended to be abſolute.

**ESTOPPEL—RECEIPT IN FULL AS.**—A daughter who executes a receipt "in full" for money advanced by her father as her portion of his eſtate is eſtopped from claiming any further portion thereof.

J. H. Stearns, for the appellants.

H. C. Hyde, for the appellees.

352 **MAGRUDER, J.** The queſtion involved in this controverſy is, whether the deed executed by Frank Brown, Sr., in his

lifetime on June 26, 1885, to his son Frank Brown, Jr., was, in the lifetime of the grantor, delivered to the grantee, so as to become a valid conveyance of the premises therein described.

There is no universal test, applicable to all cases, for the purpose of determining the question of the delivery of a deed. Undoubtedly, there is always a delivery of a deed, where the grantor makes a manual transfer of it to the grantee with the intention of passing the title from himself to the grantee, and of relinquishing all power and control over the instrument itself. This physical transfer of the deed from the grantor to the grantee is not, however, absolutely essential in all cases. "Other acts, accompanied with a clear intent to pass the title from one to the other, are equally efficacious in establishing a delivery": *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68.

In order to determine whether there was a delivery of the deed in this case, it will be necessary briefly to state the material facts, as shown by the testimony in the record. The deceased, Frank Brown, Sr., formed and carried into execution a plan for the disposition of his estate many years before his death. The three living daughters of the deceased, Katherine Weisher, Adelina Medeke, and Julia Medeke, and two of his sons, Joseph and Andrew, lived with the deceased many years, and aided him in <sup>353</sup> the household work in his home, and in work upon his farm. To these sons and daughters he gave, in his lifetime, the respective shares which he intended them to receive from his estate. He conveyed to Joseph Brown about 120 acres. He conveyed to Andrew Brown about 200 acres. He paid to his daughter, Julia Medeke, \$1,000, for which she executed to him a receipt in full of her "portion of the estate of my father, Frank Brown." He paid to his daughter, Adelina Medeke, \$1,000 in full of her portion of the estate of her father. On January 25, 1883, the appellant, Katherine Weisher, executed to her father the following receipt: "Received of Frank Brown the sum of \$1,000 in full of my portion of the estate of said Frank Brown." His deceased daughters, Mary and Delia, left home at the respective ages of sixteen and seventeen years, and were soon thereafter married. Their marriages occurred some twenty-nine or thirty years before the death of their father.

The circumstances attending the execution of the deed to Frank Brown, Jr., on June 26, 1885, are as follows: Theretofore Frank Brown, Sr., went to a justice of the peace and notary public in Lena, and said that he wanted to give his son, Frank, the farm on which he lived, but wanted his said son to pay \$300 a

year upon it as long as he himself and his wife were living. The notary advised that a deed be made, and that the condition in regard to the payment of the \$300 should be put in the deed. On the day mentioned, Frank Brown, Sr., and his wife, went back to the notary, who then made the deed as requested, and the same was signed in his presence and acknowledged. The notary then handed the deed back to the deceased, Frank Brown, Sr., who took it away with him. When this deed was made, Frank Brown, Jr., was twenty-one years old, or a little over that age, and about that time he married. As soon as this deed was executed, Frank Brown, Sr., left the farm, consisting of the 203 acres, which had prior thereto been his homestead <sup>354</sup> farm, and went to the village of Lena to live, where he did live until his death. He left the farm in the possession of his son, Frank Brown, Jr. The appellee, Frank Brown, Jr., remained in possession of said farm from June 26, 1885, up to the time of his father's death on March 1, 1895. During this time, and up to the time of taking the testimony in this case, he paid all the taxes upon the land for eleven years from 1885 to 1895 inclusive. Said taxes amounted altogether to \$542.79. During this time, also, he made improvements upon the farm, amounting altogether in value to \$2,875, said improvements consisting of the erection of barns, windmills, fences, woodhouses, cattle-shed, ice-house, digging wells, repairing the homestead and setting out orchards of fruit trees. During all this time, also, he paid \$300 per year to his father in performance of the condition named in the deed.

The inference is clear from the testimony that the appellee, Frank Brown, Jr., retained possession of the premises, and paid the taxes, and made the improvements, and made the annual payments to his father, as above stated, under the deed, and with knowledge that the deed had been executed, and also under the assurance given him by his father that the land was to be his. Frank Brown, Jr., is not a competent witness in this case and has not been allowed to testify. But his brother Joseph swears that he told his brother Frank about the execution of the deed to him by their father some eight years before the father's death. It was well understood in the family, that such a deed had been executed. Soon after it was executed, the deceased took the same to one of his sons, and read it to him, and said that Frank was to have the land. The widow and the other son, Andrew, also testified, that the deceased always spoke of the land as being Frank's land; and Andrew says his father told him the



deed was made to Frank. The regular payment of \$300 per year shows that the possession of the land was held under the terms of the deed.

<sup>355</sup> March 1, 1895, the day on which Frank Brown, Sr., died, was Friday. On the night of the Wednesday preceding this Friday, Joseph Brown was present in his father's sick-room at his bedside. About midnight his father said to him that he could not get well; he also said to Joseph at that time: "I will give you charge of Frank's deed; in that drawer [pointing to the drawer] is Frank's deed; take it and give it to him." The drawer referred to was the drawer in a bureau in the same room where the deceased died. Joseph replied to this statement of his father as follows: "I said, All right, father; it is in my charge now, and I will take care of it, and give it to Frank; I told him not to worry over things; afterward that same night, I told mother that, in that drawer [pointing to the drawer], was Frank's deed; that it was in my hands—in my charge; that she should keep it locked and let nobody have the key, because in the morning I had to go to my home and would be back as soon as I could; she said I should attend to everything; she said she would not leave anybody at the drawer for she had the key in her pocket; this conversation was in the same room where father lay sick, and in his presence; he heard it." The widow, Katherine Brown, says: "We kept the bureau drawer locked; I and Frank, my man, had the key to it; we kept the key in another place in the bureau; I got a little box, and I kept the deeds in, and some letters that I got; I kept that box in that bureau drawer, and my husband and I kept all our deeds and important papers in that box." Joseph went home the next morning, and did not see his father again before his death. Andrew Medeke was present in the sick-room a part of the time that night, and saw the deceased point to the bureau, and heard him say to Joseph: "There was the deed; he should take it and give it to Frank." After the death of Frank Brown, Sr., his widow and his daughter, Julia Medeke, were present in the house. Julia and her mother examined the drawer, and found the deed in <sup>356</sup> it. Her mother directed her to take care of it; and Julia took the box containing the deed into her mother's bed-room, and put it under the bedclothes, telling her mother where she had put it; and her mother expressed herself satisfied with her act in that regard. Joseph came the next morning, and Julia went with him into the room where the deed was; and he took it and handed it to her, and told her to take care of it for Frank; she took the deed and kept it until the next Mon-

day, March 4, and then gave it to her brother Frank, who recorded it on March 4, 1895.

Looked at from one point of view, the foregoing evidence tends to show a delivery of the deed to Joseph for Frank. There is no doubt that the deceased intended that Frank should have the deed at once and then and there. On Thursday, he stated both to his son Andrew, and to his wife, Katherine Brown, that he had already given the deed to Joseph to be given by Joseph to Frank, or for Frank. He stated to his wife that he regretted Frank's absence, and that if Frank had been present the deed would have been given to him. He several times expressed to his wife the desire that the deed should go into the possession of Frank, not after his death, but at once. It is true that there was here no manual delivery of the deed to Joseph as trustee for Frank, but the deed was present in the room and was pointed at by the deceased, and, in connection with the act of pointing at it, the deceased made the statement to Joseph: "There is the deed; take it and give it to Frank." If Frank Brown, Jr., had been present in the room, and the deceased had pointed to the deed, and had said to Frank: "There is your deed, take it," and the latter had expressed his assent to its acceptance, there would have been a delivery of the deed, although there was no manual transfer of it from the hands of the grantor to the grantee. In *Weber v. Christen*, 121 Ill. 96, 2 Am. St. Rep. 68, we said: "Where the grantor in a deed, lying in the presence of the parties to it, with the <sup>357</sup> intention of passing the estate and of divesting himself of all power over the instrument itself, directs the grantee to take possession of it, and the latter signifies his assent, the delivery will be complete without either of the parties actually touching the deed. . . . Hence the oft-repeated saying in the books, that a deed may be delivered by some act without words, or with words without any act of delivery, or by words and acts both." We have also held that a deed may be delivered to a third person for the benefit of the grantee, and, if the grantee subsequently accepts the deed, the delivery is as good as though made directly to the grantee: *Winterbottom v. Pattison*, 152 Ill. 334. This being so, we see no difference between the act of the grantor in pointing to the deed in the presence of the grantee, and the act of the grantor in pointing to the deed in the presence of a third person, who is to hold for the benefit of the grantee, and deliver it to the grantee, and who accepts the trust and executes it.

But without actually holding that the occurrences which took

place between Joseph and his father and mother on the Wednesday night before the father's death amounted to a delivery of the deed, if they are regarded as standing alone and disconnected from all the other facts in the case, yet we regard such occurrences, when considered in connection with all the other facts and circumstances herein detailed, as amounting to a delivery. The facts that the father, upon making the deed, permitted the son to go into, or remain in, possession of the premises, and pay the taxes, and make valuable improvements, and pay him \$300 a year for nine or ten years, and that he permitted this possession of his son to continue from the time of the execution of the deed up to his death, constitute an equitable estoppel against the contention of the present appellants that there was no delivery of the deed: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445. The facts thus referred to bring the case at bar within the doctrine announced in *Williams v. Williams*, 148 Ill. 426, except <sup>358</sup> that, in the latter case, there was a recording of the deed, whereas, in the case at bar, the deed was not recorded until after the death of the grantor. In *Williams v. Williams*, 148 Ill. 430, we said: "Here the declaration of intention to convey the land, the execution of the deed, the recording of the same, the declaration of having made the deed, and the grantees entering on the land, repairing fences, clearing land, and setting out fruit trees, are all shown, and this is sufficient to show a delivery and acceptance of the deed according to its terms." We have held, that, where the grantor, after the execution of the deed, continues to exercise acts of ownership and authority over the premises, and keeps possession of the land, and receives the rents from it, and pays the taxes on it until his death, these acts are inconsistent with the theory of an intentional delivery, operative and effectual to pass the title to the grantee: *Cline v. Jones*, 111 Ill. 563; *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188. If such exercise of ownership over the premises by the grantor after he has made the deed goes to show the absence of an intention to deliver the deed, then, when the possession of the premises is delivered to the grantee without any further control over them by the grantor, and the grantee is permitted by the grantor to remain in possession, and make improvements, and pay taxes, and perform the conditions specified in the deed, such acts certainly indicate an intention on the part of the grantor that the deed should be delivered. It is settled by numerous authorities that where the grantor induces the grantee to believe that a deed has been executed, which makes him the owner of certain premises, and afterward permits such grantee to act upon this belief in the construc-



tion of valuable improvements upon the land, he cannot then be allowed to say that the deed was, in fact, inoperative for want of a formal delivery: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Reed v. Douthit*, 62 Ill. 348; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Crabtree v. Crabtree*, 159 Ill. 342.

<sup>359</sup> Moreover, in the present case, the deed, executed by the deceased to his son Frank, was in the nature of a voluntary settlement, although there was a provision in it that the grantee should contribute \$300 per year to the support of his father and mother. The law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale: *Cline v. Jones*, 111 Ill. 563. In cases of voluntary settlements, the mere fact that the grantor retains the deed in his possession is not conclusive against its validity, if there are no other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute: *Cline v. Jones*, 111 Ill. 563. "A deed will not be regarded as a voluntary settlement, if there are other circumstances besides the retention of the deed by the grantor showing that he did not intend it to operate immediately, or that he had an intention contrary to that appearing upon the face of the deed": *Shovers v. Warrick*, 152 Ill. 355. There are no circumstances in this case, beyond the mere fact of the retention of the deed by the grantor, which denote an intention contrary to that appearing upon the face of the deed.

The appellant, Katherine Weishar, introduced some testimony, intended to throw doubt upon the genuineness of the receipt for \$1,000 executed by her to her father. After a careful examination of the whole evidence, we think that the receipt is genuine, and that it was executed by her at the time and place and under the circumstances mentioned in the evidence. Indeed, she herself admits that she received \$1,000 from her father, though her statement is that \$875 was paid at one time and \$125 at another. This receipt being valid, she is estopped from claiming any interest in her father's estate, because the receipt recites that it is "in full of my portion of the estate of said Frank Brown." Such releases of an heir's expectancy have been upheld by the courts as being valid: *Bishop v. Davenport*, 58 Ill. 105, and cases therein cited.

<sup>360</sup> Our conclusion upon the whole is, that there was a delivery of the deed executed by Frank Brown, Sr., to his son, Frank Brown, Jr., and that the decree of the circuit court in holding in favor of such delivery was correct.

Accordingly the decree of the circuit court is affirmed.

**DEEDS—DELIVERY OF—ESSENTIALS.**—The simplest mode of delivering a deed is a manual transfer of it by the grantor to the grantee with the intent of transferring the title to the property and of relinquishing all control over the instrument; but the delivery may be effected without actually passing the writing from the grantor to the grantee, as where, while the instrument is in the presence of both parties, the grantor directs the grantee to take possession of it, with intent to transfer the property, and the latter expresses his willingness so to do: Monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 541, on what is a delivery of a deed.

**ESTOPPEL BY DEED—GRANTOR AND PRIVIES.**—Where one sells and conveys land to which he has no title, but afterward acquires title, his heirs will be estopped to deny the title in the grantee: *McWilliams v. Nisby*, 2 Serg. & R. 507; 7 Am. Dec. 654; *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 379, and monographic note on estoppel of persons claiming under a common source of title.

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## SKINNER v. McDOWELL.

[169 ILLINOIS, 365.]

### WILLS—LIFE ESTATE WITH POWER OF DISPOSITION.

A life estate may be created by will with power to dispose of the fee, and limit a remainder after the termination of the life estate. The power of absolute disposition annexed to a life estate does not enlarge it into an estate in fee.

### WILLS—LIFE ESTATE WITH POWER OF DISPOSITION

—**REMAINDER.**—A clause in a testator's will leaving his property to his wife "to be sold, retained and exchanged, used and managed by her as she may think proper, during her life, and in case anything may be left after her death, she shall make some arrangement to have it equally divided among our children," passes a life estate to the wife, with remainder to the children, but with power in the wife to dispose of the fee. Without any disposition of the property made by her during her life the property is not subject thereafter to be levied upon by her creditors.

Winter & Winter, for the appellants.

W. L. Vandeventer and S. B. Montgomery, for the appellees.

365 **WILKIN, J.** We think the merits of this controversy turn upon one question, viz., What is the legal effect of that clause of the will of Reuben R. McDowell granting to his widow the residue of his estate, "to be sold, retained and exchanged, used and managed by her as she may think proper during her life; and in case anything may be left after her death . . . she shall make some arrangement to have it equally divided," etc? If it gives the widow but a life estate in the lands in question, vesting in his children a remainder subject to be defeated by an exercise of the power annexed to that life estate, then the lands are not subject to the judgments against the widow, and complainants have no standing in court.

It seems to be the contention of counsel for plaintiffs in error that the language of the will grants to the wife an estate in fee, without any remainder over, upon any condition, to the heirs of Reuben R. McDowell, and reliance is placed upon Redfield on Wills, volume 2, to sustain the position. The rule there announced is, "that where the devisee <sup>369</sup> has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of apportionment among certain specified persons or classes, any estate over is void, as being inconsistent with the first gift." We think counsel in error as to the application of that rule to this cause. Here the "first gift," or estate of the first taker, is "for life." True, the life tenant is given the right to sell, retain, exchange, use, and manage it "as she may think proper," but, under the decisions of this state, her title is not thereby enlarged into a fee. The rule is well established by our decisions that a life estate may be created with power to dispose of the fee, and limit a remainder after the termination of the life estate. The power of absolute disposition annexed to a life estate does not enlarge it into an estate in fee. *Kaufman v. Breckinridge*, 117 Ill. 305; *Henderson v. Blackburn*, 104 Ill. 227; 44 Am. Rep. 780; *In re Estate of Cashman*, 134 Ill. 88; *Walker v. Pritchard*, 121 Ill. 221. From the language, "in case anything be left after her death," it is also manifest that the testator intended his wife to have the right to absolutely dispose of the property, even beyond her death, if she deemed it necessary and proper. That she did not do. She died without disposing of the property, or even making any "arrangement" for its disposition, as indicated by the testator. Her life estate and all power over the property were then at an end, and, of course, the property was not subject to be levied upon by her creditors.

Our conclusion upon this point makes it unnecessary to discuss the allegations of the bill charging fraudulent conveyances by the widow. To admit that the mortgages mentioned were fraudulent and set them aside could in no way benefit complainants.

We are satisfied the decree of the circuit court dismissing the bill was right, and should be affirmed.

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**ESTATES FOR LIFE WITH POWER OF DISPOSITION.**—A life estate expressly created by will is not converted into a fee absolute or qualified, or into any other form of estate greater than for life, merely by reason of there being coupled with it a power of disposition however general or extensive: *Mansfield v. Shelton*, 67 Conn. 390; 52 Am. St. Rep. 285, and note. See *Bramell v. Cole*, 136 Mo. 201; 58 Am. St. Rep. 619, and note; *Bradley v. Carnes*, 94 Tenn. 27; 45 Am. St. Rep. 696, and note. Under a devise by a husband to his



wife of the residue of his estate "to be used and appropriated by her so much as she may wish for her happiness, without any restrictions or limitations whatever," and upon her decease, the payment of her debts, and the settlement of her estate, the remainder to vest in a trustee in trust for the children of a third party during their lives, the wife takes a life estate only, and the trust to take effect upon her death is valid: *Mansfield v. Shelton*, 67 Conn. 390; 52 Am. St. Rep. 285.

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## CITY OF CHICAGO v. WARD,

[169 ILLINOIS, 392.]

**DEDICATION—WHAT CONSTITUTES.**—If parts of a tract of land in a platted addition to a city are left without subdivision by the original owners and marked on the plat as "public ground," or, as "not to be occupied with buildings of any description," or, as "public ground—no buildings," this constitutes a dedication of such land in trust for the public.

**DEDICATION—EVIDENCE TO SHOW OBJECT.**—If nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted.

**DEDICATION—EFFECT WHEN FEE REMAINS IN OWNER.**—Although the fee in land dedicated to the public is retained by the original owner, the land is charged with the same public rights and interests as if the fee were vested in the public.

**BOUNDARIES.—IN CONVEYANCES CALLING FOR A LAKE AS A LINE,** the line at which the water usually stands when free from disturbing causes is the boundary of the land.

**RIPARIAN RIGHTS IN SUBMERGED SOIL.**—A riparian owner whose land is submerged by water does not lose his property therein if he afterward reclaims it, either by natural or artificial means; nor does lapse of time during submersion bar the owner's right to reclaim the land.

**DEDICATION—RECLAMATION OF SUBMERGED SOIL.**—If, after land is dedicated to a city as a public park, it becomes submerged with water, and the city reclaims it, it thereby reasserts its title thereto and holds the land subject to the terms of the dedication.

**DEDICATION—POWER OF LEGISLATURE.**—After land has been dedicated to a city for a public park and accepted by the city, the legislature has no power to divert the property dedicated from the purpose for which it was donated. Such diversion would be an impairment of the vested rights of abutting property owners.

**DEDICATION—EFFECT OF CHANGE IN ABUTTING PROPERTY.**—The dedication of land to a city for a public park and the vested rights of abutting owners arising therefrom are not affected by a change in the use of abutting buildings, so as to authorize the diversion of the property to another purpose than that intended by the dedication.

**DEDICATION—UNAUTHORIZED USE—INJUNCTION.**—After land has been dedicated for a public park and accepted by the city, it has no right to erect buildings thereon without the consent of the abutting property owners, in violation of the purpose for which the dedication was made; and such owners may enjoin the city from using the park for such purpose or for any other purpose not intended or prohibited by the terms of the dedication.

J. B. Barton, for the appellant.

G. P. Merrick, for the appellees.

<sup>400</sup> CARTER, J. The main question involved in this litigation is, Has the city of Chicago a right to erect, or to permit to be erected, any buildings on the tract of land known as Lake Park? Lake Park is a tract of land extending from Randolph street on the north to Park Row on the south, and from the west line of Michigan avenue on the west a distance of four hundred feet to the west line of the right of way of the Illinois Central Railroad Company. Leaving out Michigan avenue, which has a width of ninety feet, the park would be three hundred and ten feet wide and over a mile long.

In order properly to determine this question it will be necessary to advert to the history of Lake Park. In 1836 the commissioners of the Illinois and Michigan canal, under the authority conferred upon them by the general assembly of the state, caused fractional section 15, lying along the shore of Lake Michigan and adjoining or cornering with the original town of Chicago, to be subdivided into lots, blocks, and streets, and a plat thereof was made, acknowledged, and recorded on July 20, 1836. This subdivision consists of two tiers of blocks, of eleven blocks each, bounded on the west by State street, on the north by the center line of Madison street, and on the south by the center line of Twelfth street. The lots in the east half of the eastern tier of blocks all fronted to the east, and there was an open space between such east <sup>401</sup> line and the lake, except at the southwest corner, in which block 23 was laid off, beginning one hundred and twenty feet east of the east line of the eastern tier of blocks, and running thence east five hundred feet, of a uniform depth toward the north of two hundred feet, leaving a small space, the width of which was not marked on the map, about eighty feet, between the easternmost lot of block 23 and the lake. The street north of this block 23 is now known as Park Row. The distance from the eastern tier of blocks to the lake shore was therefore about seven hundred feet at Park Row. The distance at the north line of the section from the lake shore to the east line of the eastern tier of blocks was not marked on the plat, but appears to have been about five hundred feet. All the space north of block 23 and east of the eastern tier of blocks to the lake was left unsubdivided and vacant, except that the words "Michigan avenue" appear on the same next to the line of subdivided blocks. J. Y. Scammon testified that he measured the width of the ground east of Michi-

gan avenue in 1836, when the canal commissioners made their subdivision, and it was then about seven hundred feet wide at the south end and between five hundred and six hundred feet at the north end, and that the ground was a little wider at some places than others. Fernando Jones testified that he was employed in the office of the canal commissioners in 1836; that it was stated by and on behalf of the commissioners, to all persons purchasing lots in the subdivision, as an inducement to such purchases, that there would be no buildings to obstruct the view of the lake, and that the commissioners used a sketch to sell from and to point out the position of lots to purchasers, and on the sketch was marked, "open ground—no building"; that the land fronting on Michigan avenue, as well as that fronting on Wabash avenue—the next street west—sold at a higher price on account of the eastern exposure on the lake.

The land north of section 15, running to the Chicago river, being the southwest fractional quarter of section 10, was used by the United States as the military post of <sup>402</sup> Fort Dearborn as early as 1804. Under authority from the secretary of war, this fractional quarter was subdivided into blocks, lots, streets, and public grounds and called "Fort Dearborn addition," and a plat of the addition was acknowledged and recorded on June 7, 1839. Michigan avenue was continued north in this plat almost up to the river, but its width was not marked on the plat. The ground between Michigan avenue and the lake was also laid off into blocks and lots from the river down to Randolph street, but from the north line of that street to the south line of the section, being the center of Madison street, the space between the west line of Michigan avenue and the lake was left vacant and unsubdivided, as was also the east half of the block just south of Randolph street, between Wabash avenue on the west and Michigan avenue on the east, and in this blank space on the plat was written, "Public ground forever to remain vacant of buildings." The certificate of the secretary of war, written on the margin of the plat, contains these words: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." The plat shows that the southernmost lot of block 11, which lies between Michigan avenue and the lake and on the north side of Randolph street, and is thus the northern boundary of the unsubdivided space, had a frontage of seventy-three feet on Randolph street. There are no figures at the south line of the addition to indicate the distance between the west line of Michigan avenue and the lake, but measuring on the plat according



to its scale it was two hundred feet. Michigan avenue is ninety feet wide.

It will thus be seen that the land lying east of the west line of Michigan avenue, from Randolph street on the north to Park Row on the south, was by its original owners left unsubdivided; that that portion in fractional section 10 was expressly dedicated as "public ground," "not to be occupied with buildings of any description," <sup>403</sup> and that that portion in fractional section 15 was marked near one edge "Michigan avenue," and was held out to purchasers as "open ground—no buildings." That this was equivalent to a dedication for such use and purpose has been repeatedly announced by this court (*Godfrey v. Alton*, 12 Ill. 29; 52 Am. Dec. 476; *Marcy v. Taylor*, 19 Ill. 634; *Smith v. Flora*, 64 Ill. 93; *Maywood v. Maywood*, 118 Ill. 61), and where nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted: *Princeville v. Auten*, 77 Ill. 325. That the city of Chicago accepted the ground thus dedicated is undisputed. The statute provides that such dedicated lands shall be held in trust to and for the uses and purposes expressed or intended, and even in a common-law dedication, which leaves the fee in the original owner, it is charged with the same rights and interests in the public which it would have if the fee were in the municipality: *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25.

That the land was so dedicated and accepted subject to the restriction imposed of being forever unoccupied by buildings, and that this restriction extended to and included all the land between the west line of Michigan avenue and the shore of the lake as it was when these lands were platted, we entertain no doubt. But it is contended by plaintiff in error that only such land as existed between Michigan avenue and the shore of the lake as it was in 1852, when the encroachments of the lake on the land were stopped by the building of breakwaters, etc., was subject to such restrictions; that the remainder having been carried away by the waters of Lake Michigan, the boundaries of the public land were restricted to the shore of the lake, and that all the made or reclaimed land between the shore line of 1852 and the west line of the Illinois Central Railroad Company's right of way is free from such restrictions. A consideration of this question <sup>404</sup> will necessitate a further retrospect into the history of Lake Park.

Referring again to the testimony of J. Y. Scammon, we find that the building of the piers of the Chicago river by the govern-

ment eastward into Lake Michigan had the effect of throwing a strong current of water against the shore of section 10, and that when the piers were still further extended the current was thrown further south against the shore of section 15; that this current would gradually undermine the bank, and then a storm would come and the bank would fall, sometimes five, ten and thirty feet in width at a time; that sometimes there would be washed away a hundred feet in a single storm, then the wind would change and there would be a deposit of sand again; that in 1835 there were two hundred or three hundred feet between Michigan avenue and the shore at Randolph street, but two-thirds had been washed away before the platting of Fort Dearborn addition in 1839. Fernando Jones testified that prior to 1839 the waves cut away mostly between Randolph and Madison streets, and what was cut away there was deposited more or less south of Madison street, but after 1839 the big storms that came would wash away the banks as far down as Park Row; that the "shore went off in chunks" during the storms; that sometimes after a storm there would be some accretions. The testimony of R. B. Mason shows that in 1852 the shore of Lake Michigan was distant from the west line of Michigan avenue at Park Row a little over four hundred feet, thence the trend of the shore was to the west till it was only ninety feet at Monroe street, which is the street next south after Madison. It was the same width at Madison street, and, gradually receding again to the east, it was one hundred and twelve and one-half feet at Washington street, the next street north, and the same width at Randolph street, the next street north of Washington street. Michigan avenue being ninety feet wide, it will thus be seen that, from the north line at Randolph street, with a width of twenty-two and one-half feet, the park extended down to <sup>405</sup> about Madison street, a distance of two blocks, where the waters of Lake Michigan lapped the east side of Michigan avenue, and then the park recommenced at about Monroe street and gradually widened out to three hundred and ten feet at Park Row.

In 1852, the Illinois Central Railroad Company, by an ordinance of the city of Chicago, was granted the right of way of the width of three hundred feet from the southern boundary of the public ground near Twelfth street to the north line of Randolph street, the inner or west line of the ground to be used by the company to be not less than four hundred feet east from the west line of Michigan avenue. It was also required by the ordinance to erect and forever after to maintain a continuous wall or structure of stone masonry of regular and sightly appearance, and not

to exceed in height the general level of Michigan avenue opposite thereto, from the north side of Randolph street to the southern boundary of Lake Park, at a distance of not more than three hundred feet east from the above-mentioned west or inner line, which structure was to be of sufficient strength and magnitude to protect the entire front from further damage or injury from the action of the waters of Lake Michigan. It was further provided that the company should not, in any manner or for any purpose whatever occupy, use, or intrude upon the open ground known as Lake Park, belonging to the city, and that it should erect no buildings between the north line of Randolph street and the south line of Lake Park, nor place upon any part of their works between these points any obstructions to the view of the lake from the shore, and that it should make and keep open through its works such culverts or ways as would afford room for the uninterrupted flow of water from the open lake to the space inside of the inner or west line above mentioned. In pursuance of the rights thereby granted, the railroad company placed piling in the waters of the lake from Twelfth street northward, and built its tracks thereon, and built a breakwater east <sup>400</sup> of its roadway. The water space between the shore and the right of way was gradually filled up by the citizens, although at the time of the great fire of 1871 there was still a basin there, used for row boats and sail boats. After the fire the council passed an ordinance permitting the dumping of debris resulting from the fire into this space, and, the railroad company having filled in under its tracks, soon there was no more water left west of the east line of its right of way. That the city made ineffectual efforts to stay the destroying power of the waters of Lake Michigan prior to the building of the railroad breakwater is not disputed. As we have seen before, the width of the open space at Park Row, in 1836, when it was dedicated, was about seven hundred feet and at Madison street about five hundred feet. The width of Lake Park, including Michigan avenue, is four hundred feet. There was, therefore, in 1836, more than enough ground lying along the lake shore between these points for this park. From Madison street to the north line of the park when this space was dedicated, in 1839 (three years later), there was an open space between the shore and the east line of blocks of only two hundred feet at Madison street, narrowing down to one hundred and sixty-three feet at Randolph street, thus lacking from two hundred and thirty-seven feet to two hundred feet of being four hundred feet wide.

Did the city lose its title and rights to the portions of this park submerged by the waters of the lake after its dedication, or



did its subsequent reclamation restore the city to its rights? Did the temporary submergence of such portions destroy the restrictions imposed by the dedication, so that the reclaimed portion would not be subject to the same? The destruction of the shore line was not gradual and imperceptible, but was sudden, and plainly discernible after every storm, and the city made unavailing efforts to protect the shore from this destruction. In a conveyance calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land: *Seaman v. Smith*, 24 Ill. 521; *Trustees of Schools v. Schroll*, 120 Ill. 509; 60 Am. Rep. 575; *Fuller v. Shedd*, 161 Ill. 462; 52 Am. St. Rep. 380; *People v. Kirk*, 162 Ill. 138; 53 Am. St. Rep. 277.

In Hargrave's Law Tracts (Sir Matthew Hale's *De Jure Maris*), 36, 37, it is said: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet, if by situation and extent of quantity and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by Cooke and Foster, M. (7 Jac. C. B.), though the inundation continue forty years. . . . But if it be freely left again by the reflux and recess of the sea the owner may have his land as before, if he can make it out where and what it was, for he cannot lose his propriety of the soil, though it be for a time become part of the sea and within the admiral jurisdiction while it so continues."

In *Morris v. Brooke* (an unreported case arising in 1815 in Delaware), quoted in *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206, Judge Wilson said: "Though the surface of the lower part of that island (Little Tinnicum) was destroyed by the force of the winds and the waves, and it was consequently overflowed by the waters of the river, yet the owner did not lose the propriety of the remaining soil covered by the water. If it was regained, either by natural or artificial means, it continued to belong to the original proprietor. He might embank it, and thereby again exclude the waters, if circumstances permitted." And in *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206, it is said: "When portions of the main land have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of

such channels, and the ownership of the land under them, in case of its permanent acquisition by the <sup>408</sup> sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed and assert his proprietorship": See Angell on Tide Waters, 77-80. "Where considerable quantities of soil are, by a sudden action of the water, taken from the land of one, this is called avulsion; but the ownership is not lost, though the surface earth is thus transported elsewhere, and it may be reclaimed and the ownership reasserted": Angell on Watercourses, sec. 60; 3 Washburn on Real Property, 453; *Gale v. Kinzie*, 80 Ill. 132.

Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof. The trust impressed on them was that they should forever remain free from buildings, and it cannot be said that while they were submerged they were subject to be built upon. We do not see that the submergence and subsequent reclamation altered or destroyed the trust upon and for which they were held.

As the city had, as we have seen, the fee in this park, impressed with the trust declared by the dedicators, the legislation of 1861 and 1863 added nothing to its trust and can only be looked upon as confirmatory of the same. Section 64 of the act of 1861, identical with section 43 of the act of 1863, both acts being acts relative to the charter of the city of Chicago, provided that no encroachments should be made upon the land or water west of <sup>409</sup> the railroad right of way by any railroad company nor allowed thereon by the city council; that any property owner on Michigan avenue should have the right to enjoin any such attempted encroachments and recover damages therefor; and recited that "the state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago nor any other authority shall ever have the power to permit encroachments thereon without the assent of all

the persons owning lots or land on said street or avenue." No new trust was created by these statutes. They merely ordained as law what was already the law in reference to Lake Park.

A point is made by counsel for plaintiff in error on the use of the word "encroachment," it being contended that buildings would not be an encroachment, as that word is defined by Webster. Wood on Nuisances, second edition, section 77, says: "A purpresture is any encroachment upon real property, or right and easements incident thereto, belonging to the public, by an inclosure or erection thereon which, if made upon the property of an individual, would be a trespass."

In 1869 the legislature passed the act known as the "Lake Front act." By section 1 of this act the general assembly purported to grant to the city of Chicago in fee, with full power and authority to sell and convey in such manner and upon such terms as the council might by ordinance provide, all right, title, and interest of the state of Illinois in and to so much of fractional section 15 as is situated east of Michigan avenue and north of Park Row, and south of the south line of Monroe street and west of the railroad right of way, being a strip four hundred feet in width, including said avenue along the shore of Lake Michigan, and partially submerged by the waters of the lake, reserving, however, the ninety foot avenue from the right to sell. By section 4 all the right and title of <sup>410</sup> the state of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street and south of the south line of Randolph street, and between the east line of Michigan avenue and the railroad right of way, were granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington, and Quincy Railroad Company and the Michigan Central Railroad Company, for the erection thereon of a passenger depot and for other railroad business. Section 5 required these railroad companies, in consideration of this grant, to pay the city of Chicago eight hundred thousand dollars, to be paid in quarterly installments. By section 6 the city council was authorized to quitclaim and release to said companies all the city's claim and interest in this tract which it might have by virtue of any expenditures and improvements thereon or otherwise, and in case it neglected or refused to do so within four months after the passage of the act, then the companies should be discharged from paying the unpaid balance to the city. By sections 2 and 5 all these moneys arising from the sale of Lake Park were to be placed in a park fund of the city of Chicago, to be equitably distributed among the three divisions of the city. Section 3 confirmed to the Illinois Central



Railroad Company certain rights to the lands east of Lake Park covered by its railroad tracks, and granted to it in fee all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of its tracks and breakwater, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot 21, south of and near its roundhouse and machine shops, on the payment of the same percentage of the gross receipts from its use as it was bound to pay to the state by its charter on its gross receipts, which tract of submerged land so granted exceeded one thousand acres. This act was passed over the governor's veto April 16, 1869.

<sup>411</sup> About July 1, 1869, the three railroad companies tendered to Walter Kimball, then city comptroller, the first installment of two hundred thousand dollars, which he refused to accept in his official capacity, but gave his individual receipt therefor and reported the fact to the city council. The matter was referred to the judiciary committee, which, on December 20, 1869, reported back to the council, reciting the several dedications above described, together with the facts regarding the washing away of the shore and the attempts made to prevent the same, and the expenditure of money therefor, and that the city had been for years engaged in reclaiming that part of the land so dedicated, and had succeeded in reclaiming all that portion north of Monroe street; that, so far as the citizens of Chicago and the owners of the property fronting on said public grounds are concerned, the city stands in the position of a trustee; that it would be a most flagrant and unjustifiable breach of trust upon the part of the city to sell the property or in any manner to consent that this land shall be appropriated to other than public uses, and recommended the passage of a resolution declaring that the city will not receive any money from the railroad companies under the said act of the general assembly until forced to do so by the courts. The resolution was subsequently passed, and the money was afterward returned to the railroad companies at their request.

It is plain the city repudiated the privilege granted it by the legislature, and never accepted the act as binding on it. It may be said, in passing, that the supreme court of the United States, in *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, denied the right of the legislature to make this extensive grant of the submerged lands in the harbor of Chicago and held the grant to the railroad company to be ineffective, with certain exceptions.

As we have already seen, all the rights in regard to Lake Park had long previously been fixed by the acts of dedication by the original owners, the acceptance of the city <sup>412</sup> and the acquiescence and acts of the public and abutting property owners. It was beyond the power of the legislature to change the legal result of these acts, as it would be an impairment of vested rights which are protected by the constitution. In *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, 543, this court said: "A dedication must always be construed with reference to the object with which it was made. . . . The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. . . . It must be preserved or the land must revert to the original proprietors." The court cite, as fully sustaining the view it has taken: *Cincinnati v. White*, 6 Pet. 431; *Watertown v. Cowen*, 4 Paige, 510; 27 Am. Dec. 80; *Carter v. Chicago*, 57 Ill. 283; *Le Clercq v. Gallipolis*, 7 Ohio, pt. I, 217; 28 Am. Dec. 641; *Price v. Thompson*, 48 Mo. 361; *Warren v. Mayor*, 22 Iowa, 351. In *Princeville v. Auten*, 77 Ill. 325, 327, it is said: "Had this intention [that a certain square should forever remain an open space] been expressed on the plat, or even in the contemporaneous certificates, it is clear, on principle and authority, the village trustees could not lawfully appropriate it to any other public use. It would have been an abuse of the trust reposed in them, that the courts would not hesitate to control, that the property might be preserved for the uses intended by the donors." It is only where the dedication of the property as public ground is an unrestricted dedication to public use that the city or legislature may designate the uses to which it shall be put: *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25.

<sup>413</sup> As the legislature was powerless to take away any vested rights abutting property holders had in Lake Park, it is unnecessary to discuss the effect of the repeal of the act of 1869 by the legislature in 1873. The same authorities and course of reasoning also negative the proposition put forth by plaintiff in error that where the restrictions placed on the use of real property have become useless by the change of the character of the surrounding property and neighborhood, they may be disregarded. It is assumed by plaintiff in error that these open spaces were dedicated for a park, to remain free from buildings, because

Michigan avenue was then a residence street, and that because of the gradual disappearance of residences from the upper end of this street, and their replacement by business houses, therefore the open space, clear of buildings, was not needed any more. That this reasoning is fallacious need hardly be demonstrated. It is a matter of common knowledge that nearly all of our larger cities have open squares in the business portions of the city, and that these open squares are deemed and considered of great advantage, not only to the public generally, but especially to the abutting property owners. In this case, it is a vested right attaching to the abutting property by virtue of the original dedications. The cases cited in support of the position of plaintiff in error are not applicable to the facts of this case. They were cases relating to restrictive covenants in deeds, where the original owner had devised a scheme for improving the neighborhood by controlling the erection of buildings in a particular way. They have no relevancy to the case of an open park. No change in the use of the buildings abutting on a park could make the park any less a park or deprive the abutting owners of their vested rights.

But there is a strip of land within said park, as claimed by complainants, lying along fractional section 10, which cannot be said to have been reclaimed by the city after <sup>414</sup> having been submerged by the lake after the dedication in 1839. Neither was this strip formed by the slow and imperceptible process of accretion, but it is made or filled land, and is two hundred and thirty-seven feet wide at the north line of Randolph street and about two hundred feet wide at the center of Madison street, as stated above, and the question remains whether or not this strip is held by the city subject to the restrictions placed upon that part of Fort Dearborn addition adjoining it.

If this strip had been formed by gradual accretions caused by the action of the waters, it would have become a part of the shore lands. In *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476, this court held that "all accretions to a public landing must necessarily attach to and form a part of it, otherwise we should have the novel spectacle of a public landing separated from the water." In *Lombard v. Kinzie*, 73 Ill. 446, the question arose whether the widow of a riparian owner was entitled to dower in accretions to land which had accrued after the husband had parted with the land, and it was there held she was entitled to dower in such accretions; that, when formed, such accretions become subject, as an incident to the fee, to the same conditions, rights, and burdens as the principal to which they are an incident. In *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91, it was held that the lessee



of a property fronting upon a river is entitled to hold accretions as a part and parcel of the property leased. In *Chicago Dock etc. Co. v. Kinzie*, 93 Ill. 415, 429, the lot in question was bounded on the east by Lake Michigan, and this court said: "To ascertain its eastern boundary, it would be necessary to ascertain where was the line between the land and the lake; and since the accretions became a part of the land to which they were attached, it would necessarily follow that that line would follow the receding lake to the east. The accretions do not pass as appurtenant to water lot 36, but as a part of that lot." But the strip in question is filled land, and not formed by accretions.

<sup>415</sup> It is admitted that the title to this strip is also in the city, but such admission does not cover the question whether the city owns it in trust as public ground or as a part of said public park, or holds absolute title thereto in its own right, with the right to use or dispose of the property as it may see proper. Counsel for plaintiff in error says in his argument that it does not appear from the record how the city acquired title to the submerged lands north of Monroe street, which includes this strip, but claims that between the city and the state that question has been adjudicated: *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387. The question here, however, is one between these abutting property owners and the city, and if the strip last mentioned is subject to the same trust as the remainder of said park, or that part of it which became submerged after its dedication and was thereafter reclaimed, then, so far as this case is concerned, it must be regarded as a part of said public park, and the right of the city to authorize the construction of buildings upon it must be denied, if such right is denied as to the rest of the park, whatever the rights of the state might appear to be in a case where that question might be at issue.

These open lands fronting on Lake Michigan, as we have seen, had been dedicated as public ground to be kept free from buildings, and both the city and the state, by their respective legislative bodies, had declared them to be a public park to be kept open and vacant and free from encroachments. These lands declared to be a public park extended to the waters of Lake Michigan, and the title thereto carried with it riparian rights incident to its location upon the banks of the lake. These riparian rights were property rights, which the city of Chicago held in trust in the same manner that it held title to these public grounds, and whether, under any circumstances, it could, by obtaining title to the lands under the shoal waters adjacent to the park and by filling in, destroy such riparian rights and hold the title to such

filled lands free <sup>416</sup> from such trust it is not necessary here to decide, for we are satisfied, from the evidence in the case showing the acts and declarations of the city authorities in dealing with these lands, the abutting property owners had the right to assume and rest in the belief that the city was not acting in antagonism to its trust and with the purpose of destroying such riparian rights which attached to the public grounds, and of thereby acquiring an independent title to itself, but was, as such trustee, maintaining and preserving the property rights which it held in trust, and was improving said park and extending its boundaries into the shallow waters of the lake. The city was a trustee, and, besides, it had the power, by its charter, to lay out, establish, open, extend, and improve parks and public grounds; and so far as it made any addition, if it did make any, to Lake Park, by filling in said strip of submerged lands, it must, upon the record before us, be presumed that it was acting under its charter powers, and in preservation of the trust imposed upon it by the dedication, and its acceptance thereof, of these public grounds, and we are of the opinion that the city is estopped from claiming title to the same free from such trust. We have been referred to *Ruge v. Apalachicola etc. Co.*, 25 Fla. 656, and other cases as announcing a different doctrine. But the facts in those cases were different from the facts disclosed by this record, and we cannot see that the reasoning employed, if adopted, would, on a record of this character, lead to a different conclusion.

The next point of plaintiff in error is, that defendants in error have no standing in a court of equity to obtain the relief sought by their bill. In *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 544, we said: "A court of equity has the right to enforce the execution of the plainly declared trust, either upon the application of the owners of lots abutting on the square, or upon the application of the city, the trustee. . . . The square is <sup>417</sup> valuable property, intended for the use of the public, and appurtenant to the estates of the abutting lotowners": See, also, the cases cited above, in connection with that case. In *Princeville v. Auten*, 77 Ill. 325, the village trustees were enjoined from putting a town hall on the "public square" at the suit of Auten and others, and this court affirmed the decree. In *Earll v. Chicago*, 136 Ill. 277, 288, where there was a cross-petition for an injunction, the court said: "Where there is a special trust in favor of an adjoining property holder, or a special injury, a bill or suit may be maintained by an individual in respect to a public street or highway," and the decree granting the injunction was affirmed. In *Maywood v. Maywood*, 118 Ill. 61, 73, it was contend-

ed that there was a misjoinder of complainants, and the court said: "Small and Hubbard, as residents of the village, have a common interest with each other, and with the village itself, in preventing any obstruction to the use of the public square for the purposes of a park. They are, therefore, properly joined with the village as complainants." In *United States v. Illinois Cent. R. R. Co.*, 154 U. S. 225, the supreme court of the United States, in speaking of that part of Lake Park dedicated by the secretary of war, said: "The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated and the public in general. The owners of abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated." Defendants in error are the owners of the south forty-three feet of lot 3, and all of lots 4 and 5, in block 15, of Fort Dearborn addition, and have a frontage on Lake Park of one hundred and thirty-nine feet. They are clearly abutting owners, and, as such, have a right to maintain this action.

418 Nor does it make any difference that Lake Park was dedicated by two different owners at different times. The canal commissioners dedicated that part in fractional section 15 first, and in selling the abutting lots held out to purchasers the fact that such space should be clear of buildings, as an inducement. The secretary of war, who dedicated the remainder of the park in fractional section 10 three years later, it is evident, did this in order to make one continuous open space, and expressly certified that such space should remain clear from buildings, thus following and continuing the practice of the canal commissioners. Besides, this open space has always been treated by the city and the public as one park.

But it is further urged against the contentions of defendants in error that they are estopped by consenting to repeated violations of the injunction and of their rights in the park, and that by discriminating in favor of certain violators they have waived their right to restrain others committing similar violations. The proceedings and decrees in quite a number of suits were introduced in evidence, showing that, since the Lake Front act of 1869, there has been a great deal of litigation in the state and federal courts over the use of the park. The first was a suit in the federal court to prevent the railroads from taking possession of that part of the park north of Madison street under the act of 1869, insti-



tuted by one Starkweather against the Illinois Central Railroad Company, and afterward consolidated with a similar suit by the United States against the same company, brought on behalf of the abutting property owners in fractional section 15, by the United States district attorney, in which the injunction as prayed for was granted in both cases. In the summer of 1871, the first structure of any kind was built upon Lake Park, the ground between Randolph and Madison streets having been fenced in and used as a ball ground; and again, between 1877 and 1884, the same ground was fenced up and used by the Chicago baseball club, <sup>419</sup> but in the latter year a bill was filed in the federal court on behalf of the abutting property owners of Fort Dearborn addition, by the United States, against the club and the city, to enjoin the maintenance of fences, buildings, etc., and to compel their removal. The injunction was granted against the club and the city, absolutely prohibiting the maintenance of any building or structure on that part of the park described in the bill, and the baseball club removed their structures in compliance with the order. In 1882 the property owners procured a suit to be started in the United States circuit court to enjoin the Baltimore and Ohio Railroad Company from laying tracks in Lake Park, which is still pending. In March, 1883, the property owners procured one Stafford to file a bill in the circuit court of Cook county, against the city, the Trade and Labor Assembly, and a number of other corporations, railroad companies, etc., to enjoin them from occupying and encumbering, with buildings or otherwise, any part of Lake Park, and the injunction was granted enjoining the erection of any building on fractional section 15, and in May, 1883, another injunction writ was issued against the city to the same effect. In 1883 a suit was begun in the state court by the attorney general against the Illinois Central Railroad Company and the city of Chicago, which was afterward removed to the federal court, to determine the title and rights of the several parties to the lands lying east of Michigan avenue, to which bill the city of Chicago filed a cross-bill, and in which suit a decree was entered September 24, 1888, finding, among other things, that the city had title in fee to Lake Park, which decree was afterward, December 5, 1892, affirmed by the supreme court of the United States: *State v. Illinois Cent. R. R. Co.*, 33 Fed. Rep. 730; *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387.

The city has also, at various times, assumed the right to grant permission to erect structures on Lake Park or to use the same for various purposes. The first was April 23, 1873, when it authorized the erection of what was <sup>420</sup> termed the "Exposition

Building," between Monroe and Van Buren streets, on Lake Park, but such building was not to remain longer than May 1, 1877. The time was afterward extended. In 1889, W. T. Leland, an abutting property owner, procured an injunction from the circuit court of Cook county restraining the city and the Exposition Association from erecting any structure on that part of the park in section 15. The city then, on December 29, 1890, ordered the removal of all buildings from the park except the two armories, and finally, on February 9, 1891, ordered the removal of the exposition building within ninety days, and it was torn down. On March 30, 1891, an ordinance was passed giving the right to the World's Columbian Exposition to construct and maintain the building known as the Art Institute on the lake front, the title of the building to vest in the city, but the right to use and occupy the same to vest in the Art Institute as long as it should comply with the terms and conditions in the ordinance, which required free admission to the public on Wednesdays, Saturdays, and Sundays, with the right to charge admission at other times, though professors and teachers in the public schools and other institutions of learning in Chicago should be admitted free at all times. It was then sought to have the above injunction in the Leland case modified to permit the erection of this building, and such modification having been assented to in writing by all the property owners, it was accordingly modified, notwithstanding the objections of Mrs. Sarah A. Daggett, whose husband had signed her assent to the proposed modification. In pursuance of the permission thus granted, the Art Institute building was subsequently erected, with a frontage of about three hundred feet. In 1892 permission was given to erect a frame wigwam for the accommodation of the Democratic National Convention on the lake front, which was accordingly erected, and afterward torn down, as required by the city. In the same year the use of the lake front north of Madison <sup>421</sup> street for the construction of a temporary postoffice was tendered to the United States, and a temporary postoffice building erected in pursuance of such resolution, the same to be removed as soon as a permanent postoffice is built. In 1881, the city granted permission to Battery D to occupy one hundred and twenty-five feet of Lake Park north of Monroe street for an armory building, and also permission to the First Regiment of Cavalry to erect a similar building just north of the former. Both buildings were erected, of one hundred and twenty-five feet front, one story high, extending nearly back to the railroad. In 1886, the city council granted a place of burial to the family of the late Gen. John A. Logan

in Lake Park, on the recommendation of the corporation counsel that such use would not be inconsistent with its use as a park. During all this time there were numerous orders and resolutions of the city council directing the removal of tracks, platforms, express buildings, sheds, and other obstructions, nearly all of which have been removed from time to time.

The defendants in error acquired the property they own on Michigan avenue in 1887 and 1889, and the original bill in this cause was filed by them in 1890. That the abutting property owners have been diligently striving to protect their rights in the park cannot be gainsaid by anyone familiar with the litigation that has been carried on in relation thereto and with the repeated enunciations of the courts enforcing their rights. That they have quietly assented to repeated violations of these rights is not borne out by the facts in the case. Whether the city had the power to authorize the erection of the temporary buildings mentioned it is not necessary here to inquire, but we cannot agree with counsel for plaintiff in error that the defendants in error have waived all of their rights in the premises because they may have chosen to waive some of them. The only permanent building, perhaps, that is excepted from the injunction is the Art Institute, and all the property owners gave their consent to its erection.<sup>422</sup> It cannot be said that the erection of the Art Institute has so impaired the benefits to be derived from Lake Park that thereby the whole easement is gone. The defendants in error paid forty thousand dollars more for their property because of its location on the park, and would be seriously damaged by the erection of large and high permanent buildings, such as the city hall building and others.

The decree is affirmed.

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DEDICATION—WHAT CONSTITUTES, FOR PUBLIC USE—RIGHTS OF OWNER AND OF PEOPLE—PUBLIC SQUARES.—There is no form necessary for the dedication of lands for public use. All that is required is the assent of the owner of the land, and its acceptance or actual use for the purpose contemplated: *County of Yolo v. Barney*, 79 Cal. 375; 12 Am. St. Rep. 152, and note. See monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 749-757. Land is sufficiently dedicated when the owner of a tract which has been marked out as a city marks it on the map as public land reserved from sale, and it is regarded by the public and the grantor as reserved for a public market-place, though it is partly under water and has not been used by the public: *Dummer ads. Den*, 1 Spenc. 86; 40 Am. Dec. 213. See *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186; note to *Osage City v. Larkin*, 10 Am. St. Rep. 189. But dedication for one purpose does not justify use for another: *Bowen v. Delaware etc. R. R. Co.*, 153 N. Y. 476; 60 Am. St. Rep. 667, and note; and the lands dedicated may revert to the donor in a proper case because he retains the fee: *Gardiner v.*



Tisdale, 2 Wis. 253; 60 Am. Dec. 407, and note: although he cannot authorize its use, by conveyance or otherwise, for a purpose inconsistent with that of the dedication: Dummer ads. Den, 1 Spenc. 86; 40 Am. Dec. 213; Methodist etc. Church v. Mayor etc., 33 N. J. L. 13; 97 Am. Dec. 696, and note. Persons beneficially interested in lands dedicated for public purposes have a right of action to protect their interest: Pomeroy v. Mills, 3 Vt. 279; 23 Am. Dec. 207; Le Clercq v. Gallipolis, 7 Ohio, pt. 1, 217; 28 Am. Dec. 641, and note.

**WATERS AS BOUNDARIES—LAND BORDERING ON LAKES.** By the common law, the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water: Lamprey v. State, 52 Minn. 181; 38 Am. St. Rep. 541, and note. A grant of land bounded by the meandered lines of a natural lake conveys only to the water's edge: Fuller v. Shed, 161 Ill. 462; 52 Am. St. Rep. 380, and note.

**WATERS AND WATERCOURSES—SUBMERGED LAND—RIGHTS OF OWNER.**—If part of a tract of land bordering on a navigable river is submerged or washed away, the owner cannot regain it except by accretion beginning at the water's edge: Cox v. Arnold, 129 Mo. 337; 50 Am. St. Rep. 450. See De Baker v. Southern Cal. Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237, and note.

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## **NIBLACK v. PARK NATIONAL BANK.**

[169 ILLINOIS, 517.]

**BANKS AND BANKING—CHECKS—PRESENTMENT.**—If a notary public takes a check to the bank upon which it is drawn during banking hours for the purpose of demanding payment, but, finding the bank closed, makes such demand upon its president, the check is properly presented.

**BANKS AND BANKING—CHECK AS ASSIGNMENT OF FUND.**—The drawing and delivery of a check upon a fund in a bank are in effect an assignment to the holder of the check of so much of the fund as the check calls for.

**BANKS AND BANKING—BANKER'S LIEN ON DEPOSIT.** As against third persons, a banker's lien for money loaned does not extend to money deposited with him by the debtor to be dealt with according to the customs and usages of banks.

**BANKS AND BANKING—BANKER'S LIEN.**—If a bank holds a demand note, or a note past due, it has a right to charge it up against the maker's deposit account, and, if it does so before a check drawn by the depositor is presented for payment, it is entitled to hold the deposit as against a check afterward presented.

**BANKS AND BANKING—BANKER'S LIEN ON DEPOSIT—INSOLVENCY.**—If a bank holds a demand note, or a note past due which it has not charged up against the maker's deposit at the time his check is presented for payment, it cannot hold the deposit as against the check; and the fact that the bank has suspended and passed into the hands of a receiver before the check is presented does not operate to transfer the drawer's deposit to the payment of his note, to the exclusion of the payment of such check.

Action to recover the amount of a check. At the time of the presentment of such check for payment, the bank on which it

was drawn had suspended business and passed into the hands of a receiver. It held a demand note against the maker of the check, and, although it had taken no steps to charge such note up against the deposit of such maker, it claimed the right to hold such deposit in payment of its note as against such check. The trial court gave judgment in favor of payment of the check and interest. The appellate court reversed this judgment, and the plaintiff appealed to this court.

J. S. Harlan and S. S. Gregory, for the appellant.

W. Brace and J. T. Richards, for the appellee.

**519** WILKIN, J. It is contended by appellant that inasmuch as at the time of the making and presentment of the check the Park National Bank held sufficient funds belonging to the maker of the check to pay it, and at that time had **520** taken no steps to appropriate the deposit to the payment of the note in its favor, the bank could not afterward appropriate this fund to the payment of its note and refuse to pay the check. On the other hand, it is contended by appellee, first, that the check was not properly presented for payment; and next, if it was presented, even after presentment the bank had the right to appropriate the maker's funds then on deposit to the payment of its own note, rather than to the payment of the check.

We think the check must be treated as properly presented to the bank for payment. It appears from the evidence that a notary public, with the check, went to the bank during banking hours for the purpose of demanding payment for appellant, but found the doors closed. He then made a demand of payment of the bank president. Everything was done to present the check for payment which could be done by the holder. If a check is presented to the bank for payment during business hours, and the doors be closed, this is due diligence on the part of the holder of the check, and it may be protested for nonpayment: *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436.

It is a well settled rule in this state that the drawing and delivery of a check upon a fund in the bank are in effect an assignment to the holder of the check of so much of the fund as the check calls for. But the contention of appellee seems to be, that although the making and delivery are an equitable assignment of so much of the deposit, the banker has the right to refuse payment of the check, even when presented by a third person, and appropriate the money to the payment of a debt due from the maker to himself, on the theory that he has a lien upon the deposit in favor of himself to the extent of the maker's

indebtedness—or, in other words, it is insisted that the bank has a right of setoff, to the extent of the note, against the maker of the check, and may exercise the right of setoff when the check which is held, even by the third person, is presented.

<sup>521</sup> The question in the case of *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398, is very similar to this. The banker holding a note, which was not due, against the maker of the check, refused to pay the check which was presented by a third party, although, at the time of making and presentment, there were sufficient funds on deposit to the maker's credit to pay it. There, as here, the attempt was to maintain that the banker had a lien upon the funds in his possession to pay an indebtedness to himself. The court said: "In the very nature of such transactions, a banker's lien cannot extend to the money left on deposit with him, according to the customs and usages of banks. It has never been so extended, but is confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of the securities or valuables, either in possession or expectancy. This is the extent of a banker's lien": Citing *Russell v. Haddock*, 3 Gilm. 233; 44 Am. Dec. 693. The right of setoff was urged in favor of the bank as against the maker of the check, and the court further said: "The other proposition, that of a right to an equitable setoff, might be conceded if no third party was in the way. The third party here is the appellee, whose right to this money was fixed on the 17th of October—the day the check was presented and payment demanded. This right of setoff, as claimed, is but another phase of the banker's lien, and has no foundation in law or justice, as against a checkholder for value."

Had the maker himself presented this check, the bank would have had the right to refuse payment, and could have appropriated his deposit to the payment of the indebtedness. It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account, and, if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterward presented. But here, Niblack, a third party, presented the check, which <sup>522</sup> amounted to the transfer of so much of the fund to him as the check called for, and no right of setoff existed in favor of the bank thereafter. He had received it for value. It had been drawn against a fund sufficient to pay it, belonging to the drawer. Taken in the usual course of business, it was clothed with all the rights which the customs of business gave it for commercial convenience.



When presented the fund still stood to the credit of the maker, and according to the decisions of this court the bank had no legal right then to refuse payment.

Counsel for appellee contend that the note being due and the bank having passed into the hands of the comptroller when the check was presented, that state of facts itself transferred the deposit to the payment of the note. The fact that the comptroller took charge of the bank did not make any change in the relation of the parties. The comptroller, and the receiver afterward appointed by him, acted for the bank. Having seen that the banker's lien does not extend to money on deposit when checks are presented by third persons who are holders, in the regular course of business, neither the comptroller nor the receiver had any more right to make the transfer than the bank itself.

It is also urged that even if the appellate court was in error and its judgment must be reversed, the trial court erred in instructing the jury to allow interest upon the face of the check from the twentieth day of June, the day of protest, and for this reason the judgment of the latter court should be reversed. We are satisfied that the check was duly presented for payment on the 20th of June, and hence interest was properly allowable from that time. We find no merit in this contention.

The judgment of the appellate court reversing the judgment of the circuit court is reversed and the judgment of the circuit court is affirmed.

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**CHECKS—AS ASSIGNMENT OF DRAWER'S FUNDS.**—A check is an assignment of so much of the drawer's funds as amount to the sum designated in the check: *Whitehouse v. Whitehouse*, 90 Me. 468; 60 Am. St. Rep. 278, and note.

**BANKS AND BANKING—APPLYING DEPOSIT TO PAYMENT OF NOTE.**—A bank holding a depositor's note past due is entitled to set it off against the amount due him upon his deposit account: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. But the setoff should be made against funds not previously appropriated by the depositor to be held for a different purpose: *First Nat. Bank v. Peltz*, 176 Pa. St. 513; 53 Am. St. Rep. 686; *German Nat. Bank v. Foreman*, 138 Pa. St. 474; 21 Am. St. Rep. 908.

**CHECKS—TIME AND PLACE OF PRESENTMENT—ESSENTIALS.**—It is an almost universal rule that if the bank upon which the check is drawn and the holder are in the same place, the check must, in the absence of special circumstances, be presented for payment within banking hours of the day it is received or the day after: *Monographic note to Holmes v. Briggs*, 17 Am. St. Rep. 808; note to *Mohawk Bank v. Broderick*, 27 Am. Dec. 196, 197.

# WEBBE v. WESTERN UNION TELEGRAPH COMPANY.

[169 ILLINOIS, 610.]

**TELEGRAPH COMPANIES—RELATION BETWEEN COMPANY AND RECEIVER OF DISPATCH.**—No relation of contract exists between the receiver of a dispatch and the telegraph company, and the proper remedy of the former for damages on account of its alteration is an action in tort.

**TELEGRAPH COMPANIES—STIPULATIONS ON BLANKS, WHETHER BINDING ON RECEIVER OF MESSAGE.**—A receiver of a telegraphic message is not bound by provisions printed thereon requiring a claim to be presented within sixty days, in the absence of proof that he assented to such provision, although he had notice thereof.

**TELEGRAPH COMPANIES—RECEIVER OF DISPATCH—WHETHER BOUND BY PRINTED CONDITIONS.**—A receiver of a telegraphic message suing the company in tort for negligent alteration in transmission, is not bound by printed conditions appearing on the message as received, to which he has not assented, but of which he has knowledge.

**TELEGRAPH COMPANIES—RULES, WHEN NOT BINDING.**—A rule adopted by a telegraph company regulating its relations with its patrons, is not binding upon them without their assent, although they have knowledge thereof.

**TELEGRAPH COMPANIES—KNOWLEDGE OF CONDITIONS—WHEN QUESTION FOR JURY.**—The question whether the receiver of a telegraphic message who has used the blanks of the company for several years has knowledge of the printed conditions thereon is a question for the jury to determine.

Page & Booth, for the appellant.

Williams, Holt & Wheeler, for the appellee.

**614 MAGRUDER, J.** Upon the blank form, containing the telegraphic message delivered by Haas to the appellee's operator at Montgomery, Alabama, there were printed in small type certain conditions, among which was the following: "The company will not hold itself liable . . . in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

Upon the back of the blank form, upon which the dispatch as delivered to appellant in Chicago was written, certain stipulations and conditions were printed, the last of which was as follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is contended by appellee that the claim here sued upon was not presented in writing within the sixty days named in the printed conditions. It is not altogether clear, under the evidence in this case, that the claim was not presented in writing

within sixty days as required by the condition. On February 7, 1893, one of the attorneys of the appellant wrote a letter to an officer of the appellee company. Although this letter stated that the claim for damages was made against appellee on behalf of I. H. & J. C. Haas, yet the letter explained fully the nature of the alteration which was made in the dispatch, and the nature of the claim based upon the loss incurred by reason of that alteration. But whether the claim was presented in writing within the sixty days or not, it seems to be conceded that the action of the court in instructing the jury to find for the defendant was based upon the <sup>615</sup> conclusion that the claim was not presented in writing within the time named.

The question in the case is, whether the court erred in taking the case away from the jury. The further question involved is, whether the failure to present the claim in writing within the sixty days, if there was such failure, constitutes a defense against the present action. It is not denied that the company was guilty of negligence in delivering the dispatch as altered, instead of delivering it as originally sent. At any rate, no contest is made upon the question as to whether there was such negligence or not. Counsel for appellee confine themselves in their brief to the proposition that, for want of a claim in writing within sixty days after the dispatch in question was sent, appellant's right of recovery is barred.

It is to be noted that this suit is not brought by Haas, the sender of the dispatch, but by Webbe, the receiver of the dispatch as changed. The dispatch, as sent, is signed by the sender, but the dispatch, as received, is not signed by the receiver. The question then arises, whether any difference exists between the right of recovery by the sender of the dispatch and the right of recovery by the receiver of the dispatch, so far as these printed conditions upon the blank forms are concerned. We have held that the relation of contract exists between the sender of the dispatch and the telegraph company, but that no relation of contract exists between the receiver of the dispatch and the telegraph company; and that the proper remedy of the receiver of the dispatch for damages on account of its alteration is an action in tort: *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; 15 Am. St. Rep. 109. Ordinarily, where a shipper of goods, or the sender of a telegraphic dispatch, is held to be bound by stipulations or conditions printed upon the blank form of a receipt, or bill of lading, or dispatch, it is upon the ground that the person so bound signs the document containing the conditions, and makes a contract with the company, which <sup>616</sup> is to carry his



goods or transmit his message. It would seem to be clear, however, that such conditions and stipulations would not have the same binding effect where, as here, no contract relation exists.

In a case where a suit in assumpsit for damages was brought by the sender of a dispatch against the telegraph company, we held that the telegraph company is a servant of the public, and bound to act whenever called upon, its charges being paid or tendered; that such companies are, in this respect, like common carriers, and, though not regarded, like common carriers, as insurers of the safe delivery of every message intrusted to them, yet their duty is to transmit correctly the message as delivered; that they are bound to the use of due and reasonable care, and liable for the consequences of carelessness or negligence, in the conduct of their business; that where a party desiring to send a telegraphic dispatch is required by the company to write his message upon a paper, containing a condition exonerating the company from liability for an incorrect transmission of the message unless it shall be repeated and at an additional cost therefor to the sender, such a restriction, even if regarded as a contract, is unjust, without consideration, and void; that it is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence by contract; that, notwithstanding any special condition which may be contained in a contract between a company and the sender of a message respecting the liability of the former in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by its own fault; that it will depend on circumstances whether a paper, furnished by the company on which the message is written and signed by the sender is a contract or not; that it is a question for the jury to determine, as a question of fact, upon evidence aliunde, and from all the circumstances attending the signing of the paper, whether or <sup>617</sup> not the sender of the dispatch has knowledge of its terms and assents to its restrictions: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. The *Tyler* case distinctly held that assent by the sender of the dispatch to the printed terms and conditions upon the blank form must be shown, in order to make such terms and conditions binding as a contract upon the sender. The doctrine of the *Tyler* case has been subsequently indorsed and approved by this court: *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; 15 Am. St. Rep. 109.

If assent to such terms and conditions is necessary to bind the sender of the dispatch, surely assent to such terms and con-

ditions, as printed upon a dispatch delivered, will be necessary to bind the receiver thereof. The receiver of the dispatch will certainly not be bound by a provision thereon, requiring a claim to be presented within sixty days, in the absence of proof that he assented to such a provision: *Western Union Tel. Co. v. Fairbanks*, 15 Ill. App. 600; *Western Union Tel. Co. v. De Golyer*, 27 Ill. App. 489; *Western Union Tel. Co. v. Lycan*, 60 Ill. App. 124.

It is said, however, that the requirement that the claim should be presented within sixty days is a reasonable requirement, and that a party suing for damages will be bound to show that he has complied with such requirement, if he had notice or knowledge of the same, or if there were any circumstances of such a character as to affect him with such notice or knowledge. Upon an examination of the authorities, it will be found that, in most cases where the provision in regard to the limit of sixty days has been held to be reasonable, and notice or knowledge of the same has been held to be binding upon the plaintiff in the suit, the controversy has been between the sender of the dispatch, and the telegraph company. Such doctrine however, has no application as between the receiver of the dispatch, whose suit is in tort against the company for negligence in the performance of a public duty, and the telegraph company. From <sup>618</sup> the rule that assent is necessary to make such a condition as the sixty day limit binding, it necessarily follows that mere notice or knowledge of such condition will not affect the receiver of the dispatch. It is against public policy that a telegraph company may adopt rules, regulating its relations with its patrons, which, if they are reasonable, shall be binding upon such patrons without their assent, if they only have knowledge. Counsel for appellee refer to the case of *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596, as supporting the doctrine contended for by them; but "there is in that case (*Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596) no departure from the uniform decisions of this court, that a carrier cannot be released from the duties and liabilities annexed to its employment, unless the shipper assents to the attempted restrictions": *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; 34 Am. Rep. 191.

Some of the cases seem to hold that the printed conditions upon blank forms of telegraphic dispatches, including the one in reference to the limit of sixty days, are mere regulations, and not contracts between the sender of the message and the telegraph company. The force of the distinction thus sought to be

made lies in the fact that, if the conditions or stipulations are considered as mere regulations, the assent of the sender to them is not necessary, but that he will be bound if they are brought home to his knowledge; whereas, if they are held to be parts of a contract, the assent of the sender must be shown in order to bind him: *Croswell on Law of Electricity*, sec. 493. But whatever may be the correct view of these conditions as being regulations or contracts where the controversy is between the sender of the dispatch and the telegraphic company, we are of the opinion that such distinction has no application where the controversy is between the company and the receiver of the dispatch: *Croswell on Law of Electricity*, sec. 540. There is no proof of contract between the telegraph company and the person to whom the message is addressed, and, therefore, <sup>619</sup> he could not be held bound by these conditions or stipulations: *Croswell on Law of Electricity*, sec. 504, and cases cited in note 2.

Counsel for appellee rely mainly upon the case of *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, as authority for the position that such conditions and stipulations, including the limit of sixty days, are binding upon the receiver, as well as the sender, of the dispatch. But we are not inclined to assent to the doctrine of the Tennessee case. The author of the opinion in that case refers to cases holding that the addressee of the message is not bound by the stipulation as to the sixty day limit, because he did not make the contract; and also to cases holding to the contrary, and says that it is not necessary to determine, in the case there under consideration, where the weight of authority lies. The conclusion announced in that case rests mainly upon two considerations, namely: 1. That where the receiver of the message is a patron of the company, he will be presumed to have knowledge of the form of the contract embodied in the blanks used; 2. That the receiver's right to recover rests entirely upon the contract of sending, and upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right. We are unable to see that these considerations can have any influence, where the action brought by the receiver of the dispatch is an action in tort for damages for the careless and negligent performance of a public duty.

The opposite view from that contended for by counsel for appellee is supported by respectable authority, and is in harmony with the decisions heretofore rendered by this court, and is a natural corollary from such decisions. *Gray on Communication by Telegraph*, at section 75, says: "The printed matter upon the



blank form, upon which a message is delivered at the place of destination, acquaints the receiver usually with the fact that the telegraph company <sup>620</sup> will not be liable for a loss in any case in which claim for that loss is not presented in writing within sixty days after sending the message. As the receiver's right of action is purely one in tort, it is difficult to see how the telegraph company can arbitrarily compel a claim for loss to be made within any particular time. The general rule is, that an action of tort can be brought without other notice at any period within the time allotted to it by the statute of limitations." Upon this subject the supreme court of Nebraska says: "The clause printed on the telegraph blank to the effect that the telegraph company would not be liable for damages in any case, unless the claim was presented in writing in sixty days, was and is unreasonable and wholly without consideration if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. . . . The attempt, so often indulged in by insurance and telegraph companies to prescribe for themselves a law, is not one that appeals to the judgment, or commends itself to the conscience of this court": *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490.

Croswell, in his work on the Law Relating to Electricity, section 557, says: "In actions of tort by the addressee of the message, it is difficult to see how any limit of time, in which claims must be made against a telegraph company for damages occasioned by error or negligence in sending the message, can affect the plaintiff. In such cases, the plaintiff has no privity with the sender of the message, but sues solely for the breach of duty by the telegraph company, i. e., the failure of the telegraph company to perform its public duty of transmitting dispatches promptly and with due care, and has nothing to do with the special contract between the sender and the telegraph company, and, therefore, whatever stipulations the sender may make with the telegraph company should not bind the addressee."

<sup>621</sup> The learned author of the article on Telegraphs and Telephones, in volume 25 of the American and English Encyclopedia of Law, pages 807, 808, says: "Other authorities hold that the receiver's action is not on the contract, but for the tort, i. e., for the breach of the company's public duty. Under this view of the rule, the stipulations in the original contract can have no binding effect upon the receiver's action. As a matter of fact, the telegraph companies endeavor to incorporate the stipulations

into the message as delivered, but as the receiver does not attach his signature thereto, they are of no effect, unless it can be shown that they were brought to his notice and assented to by him": *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; *Western Union Tel. Co. v. Longwill*, 5 N. Mex. 308; *Herron v. Western Union Tel. Co.*, 90 Iowa, 129; *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362; *De la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Harris v. Western Union Tel. Co.*, 9 Phila. 88.

It is well settled that, even if the stipulation in question would be binding upon the receiver of the dispatch in case of an assent thereto, it is a question for the jury to determine whether there was such assent or not; and, even if mere notice or knowledge of the stipulation would bind the receiver of the dispatch, the question whether such receiver had notice or knowledge is a question of fact to be determined by the jury from all the facts and circumstances in the case: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Croswell on Law of Electricity*, sec. 546.

In the case at bar, the appellant swore that he had never read the printed matter on the blank received by him, and never knew what it was; that he had never heard of the sixty-day condition until a few days before testifying; and that he did not know what the terms of the conditions upon the blank form were, and had not only never read them but had never heard them talked about. The evidence, it is true, showed that, for a number of <sup>622</sup> years, the appellant had been conducting his business correspondence by telegraph, and that most of it had been conducted over the lines of the appellee, and that he had received and sent most of the telegrams upon the blanks of the appellee. This proof did not authorize the court below to take the case from the jury, and direct them to find for the defendant. Even if the circumstance that appellant had used the blank forms of the appellee for a number of years had a tendency to show his notice or knowledge of the conditions printed thereon, yet it was for the jury to say what effect should be given to such circumstances, considered in connection with all the other testimony in the case. Where certain consignees were frequent shippers by a certain line, and were in the habit of receiving bills of lading with certain conditions therein, a presumption was held to arise that such consignees were familiar with the contents of the bills of lading. The presumption of such familiarity, however, would only arise out of the fact of the

use of the blanks where there was no evidence to the contrary. The presumption that thus arises is not conclusive: *Merchants' Dispatch etc. Co. v. Moore*, 88 Ill. 136; 30 Am. Rep. 541. Here, whatever presumption may have arisen against the appellant, in favor of his familiarity with the terms of the conditions printed upon the blank used by him, was rebutted by his sworn statement, that he had never read the terms of those conditions, and did not know what they were. Certainly, it was the duty of the court to leave it to the jury to say whether or not he assented to the condition in regard to the limit of sixty days.

For the error in taking the case away from the jury and instructing them to find for the defendant, the judgments of the appellate court and of the circuit court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

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**TELEGRAPH COMPANIES—POWER TO IMPOSE CONDITIONS UPON SENDING OF MESSAGES—WHEN CONDITIONS ARE BINDING.**—Telegraph companies generally furnish to their customers message blanks upon which are printed the regulations or conditions upon which they transmit the messages, and these conditions, if reasonable, are regarded as forming part of the contract between the company and the sender of the message. As to whether notice to the sender of such conditions is necessary to render them binding upon him the cases are divided, though the question of their reasonableness is of more importance in determining their binding force: See monographic note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 466; *Birkett v. Western Union Tel. Co.*, 103 Mich. 361; 50 Am. St. Rep. 374, and note; *Western Union Tel. Co. v. Neel*, 86 Tex. 368; 40 Am. St. Rep. 847, and note. Where such notice of, coupled with assent to, such conditions, was held necessary to render them binding upon the sender, it was considered a question of fact for the jury whether such notice had been received and such assent given: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38.

**Telegraph Companies—Stipulations in Blanks, whether Binding on Receiver of Message.**

*Contract Relations.*—The question whether the addressee or receiver of a telegraphic message is bound by the stipulations contained in the blank upon which the message is written, depends upon the ground upon which the court bases the right of recovery. Some of the cases consider that the receiver's right to recover rests entirely upon the contract made by the sender, and upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right. Whenever this view is taken, it necessarily follows that the receiver can assert no rights except under the contract as made by the sender, and he is therefore bound by the conditions and stipulations appearing upon the blank upon which the message is sent and to which the sender has assented: *Manier v. Western Union Tel. Co.*, 94 Tenn. 442; *Russell v. Western Union Tel. Co.*, 57 Kan. 230; *Stamey v. Western Union Tel. Co.*, 92 Ga. 613; 44 Am. St.



Rep. 95; *Western Union Tel. Co. v. Culbertson*, 79 Tex. 65; *Findlay v. Western Union Tel. Co.*, 64 Fed. Rep. 459; *Western Union Tel. Co. v. James*, 90 Ga. 254; *Aiken v. Western Union Tel. Co.*, 5 S. O. 358; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589. In an action brought by the addressee of a telegram against a telegraph company to recover damages for its failure to promptly deliver the message, the plaintiff's rights must, according to these decisions, be determined by the contract made by the sender with the company. He cannot repudiate the contract made for his benefit and still recover damages for the failure of the company to perform it: *Russell v. Western Union Tel. Co.*, 57 Kan. 230. In *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, it was held that both the sender of a telegraphic message and the person to whom it is addressed are bound by reasonable regulations, printed upon a blank furnished by the telegraph company, upon which the message is written and signed by the sender. The cases which place the right of the receiver of the message to recover against the company on the ground of contract hold that the addressee is bound by a stipulation on the blank, on which the message is written and signed by the sender, to the effect that the company shall not be liable for damages in any case when the claim is not presented in writing within a reasonable specified time after sending such message. The time specified in such blanks is usually sixty days: *Manier v. Western Union Tel. Co.*, 94 Tenn. 442; *Russell v. Western Union Tel. Co.*, 57 Kan. 230. In this latter case, the court, speaking of the addressee of the telegram, said: "The plaintiff had no cause of action independent of the contract made for his benefit by the sender of the message. Having failed to present his claim within the time required by the contract, he has lost whatever right of action the contract gave him": *Russell v. Western Union Tel. Co.*, 57 Kan. 234. In discussing this sixty-day limit within which to make a claim against the telegraph company for damages caused by its negligence after the message is sent, the court in *Manier v. Western Union Tel. Co.*, 94 Tenn. 447, said: "The cases make an overwhelming preponderance in favor of binding the addressee in the relation of complainant, which was not only of addressee, but of addressee beneficially interested, and as one receiving a message on a similar blank to that used by the sender, and as a patron of the company, upon whom knowledge of the form of the contracts embodied in these blanks might be charged. We think the sound rule is, that the contract made between the sender and the telegraph company, which is for the benefit of the addressee, confers upon him the benefits, and charges him with the conditions of the contract." To the same effect is *Western Union Tel. Co. v. James*, 90 Ga. 254. In *Findlay v. Western Union Tel. Co.*, 64 Fed. Rep. 459-461, the court, in speaking of such limitation, remarked: "The plaintiff thus claims the benefit of this contract of transmission, and avers that he has been damaged by the breach of it, claims the benefit of its obligations, makes himself a party to its provisions, placing himself in this relation to it, and

demanding a strict enforcement of his rights under it. It cannot be successfully contended that he is exempt from the operation of certain provisions of the contract to be complied with on his part before he can successfully assert his rights to the benefits accruing under it, or a redress of wrongs growing out of its violation. The contract is an agreement between the sender and the telegraph company that, for a stipulated price, the company shall carry a message from the sender and deliver the same to the receiver. It is the same contract when delivered to the receiver that it was when it came from the hands of the sender. He takes it with all the rights that accrued to the sender, and he assumes all the obligations that it imposes on the sender when he comes to assert his rights under it. . . . The foregoing authorities, as well as others that might be cited, sustain the position of counsel for defendant that the limitation of sixty days within which a claim must be filed in writing applies as well to the receiver as to the sender of a message. The court, on principle, can arrive at no other conclusion than that the reasons for the existence and enforcement of the rule against the sender are the same, and equally strong for the enforcement of the same against the receiver." The same rule was held to apply to a twenty and thirty day limitation on night messages in *Western Union Tel. Co. v. Culberson*, 79 Tex. 65, and *Aiken v. Western Union Tel. Co.*, 5 S. C. 358. If the message as delivered to the company for transmission is not accompanied by any condition requiring notice of claim for damages to be given within sixty days, the company cannot impose such condition on the addressee by virtue of its being contained in the printed form on which the message is transcribed for delivery to him: *Western Union Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518. In case of the nondelivery of a message, it has been held, as applicable to the addressee, that when knowledge of the sending of the message has been received by him long enough before the expiration of the time limit after it was sent to enable him, with reasonable diligence, to make a claim for damages, he must do so within that time, and, if it is doubtful whether such reasonable time remained after he received knowledge of the sending of the message to enable him to make such claim, the question must be determined by the jury: *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608. In another case it was said, and with better reason: "If, therefore, the action was begun within sixty days after knowledge by the addressee of the failure to deliver the message, it would be such a compliance with the stipulation as could be required in a case where a message was not delivered at all. If not brought within such time, the plaintiff is barred by his own negligence in not presenting his claim within the specified time": *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527-532; and to the same effect is *Herron v. Western Union Tel. Co.*, 90 Iowa, 129. It has also been held that a stipulation in telegraph blanks fixing a time within which claim for damages must be presented is unreasonable and void in case of failure to deliver the message at all, and especially when sought to be applied to the addressee in such case: *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362. If a message is received by a tele-



graph company for transmission written upon a blank which contains a statement that every important message should be repeated by being sent back from the station where received to the station from which it is originally sent, for which repetition half the usual price will be charged, and that the company will not be responsible for any error in the transmission of any unrepeatd message beyond the amount paid for sending it, without special agreement in writing, and if an error occurs in transmission and the message is not repeated by request, and the message as received is written upon a blank similar to the one upon which it is sent, and in that form delivered to the addressee, the latter cannot maintain an action against the company to recover greater damages than the amount paid for sending the message, without further proof of negligence on the part of the company than that resulting simply from the error: *Ellis v. American Tel. Co.*, 13 Allen, 226. The same rule is maintained in *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285.

In other jurisdictions, a contrary doctrine prevails to the effect that a rule of a telegraph company in relation to the repetition of messages to guard against mistakes, and limiting its liability for unrepeatd messages, applies only to the sender and not to the receiver of the message: *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375; 28 Am. St. Rep. 802; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338. "The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions can be invoked only as against the sender, if against any, for it is his message, his language, that is to be transmitted, and it is only known to the receiver when delivered and as delivered. He is to be guided or informed by what is delivered to him, and he has no opportunity to agree upon any such condition before delivery": *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. In *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, the same rule is announced, but the decision is put upon the ground that a condition placed upon its blanks by a telegraph company, exempting it from liability for unrepeatd messages, is not a contract binding in law.

*Actions in Tort.*—Some authorities maintain that the right of action which rests in the addressee of a telegram to recover for the negligence of the telegraph company does not arise out of the contract between the sender and the company, nor out of contract at all, but for a tort that is for a breach of public duty on the part of the company. In those jurisdictions where this rule maintains, it is universally held that the stipulations contained in the original blank or contract are not binding upon the addressee and do not affect his right of action: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511. Under this doctrine, the addressee in the message is not bound by the contract between the sender and the company, and his failure to present his claim for damages within the sixty days stipulated for in such contract is no defense to his action: *Western Union Tel. Co. v. McKibben*,



114 Ind. 511. If a message is sent under stipulations, agreed to by the sender, providing for repeating messages, and limiting the liability of the company for unrepeatd messages, these stipulations have no effect upon the right of the addressee of the message to recover his full damages for the negligence of the company in failing to deliver the telegram within a reasonable time: *Western Union Tel. Co. v. Fenton*, 52 Ind. 1. Although the telegraph companies endeavor to incorporate the stipulations upon their blanks into the message as delivered, they are of no effect upon the receiver of the message, under this rule, considering him as not a party to the contract and whose only right is to sue in tort, for the reason that he does not sign the message, and, unless it can be shown that such stipulations were brought to his notice and assented to by him, he is not bound thereby: *Western Union Tel. Co. v. Lyan*, 60 Ill. App. 124; *Webbe v. Western Union Tel. Co.*, 169 Ill. 610; ante, p. 207, the principal case.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**STATE v. SMITH.**

[99 IOWA, 26.]

**EVIDENCE.—PROFESSIONAL COMMUNICATIONS ARE NOT PRIVILEGED WHEN** made for an unlawful purpose having for their object the commission of a crime. Hence, if a physician is called upon by one woman for the purpose of producing, or assisting in producing, a miscarriage of another, communications made to him in which the patient did not participate are not privileged.

**EVIDENCE, WAIVER OF ERROR IN OVERRULING OBJECTION TO.**—If, after evidence is offered and an objection thereto is sustained, the counsel offering it states what he wishes to prove thereby, and his adversary thereupon withdraws the objection, or offers to do so, and the counsel whose witness is under examination refuses to proceed further with his question, he must be deemed as having waived his right to examine the witness respecting thereto.

**EVIDENCE, STENOGRAPHIC NOTES, READING FROM.**—An official reporter who has taken stenographic notes of the testimony of a witness given at a former trial may be permitted to testify therefrom what the testimony of the witness was, though he has no recollection upon the subject and must depend entirely upon his notes.

**CRIMINAL TRIAL—CORROBORATION OF WITNESS.**—UPON A PROSECUTION FOR PRODUCING AN ABORTION, the woman upon whom it was produced is not to be treated as an accomplice whose testimony must be corroborated.

**JURY TRIAL, VERDICT CLAIMED TO BE DUE TO COERCION.**—Though a jury retires about 3 o'clock of one day and returns its verdict about 4 o'clock of the next, and it appears that the jurors had been informed that the judge was about to be absent for three days and that they would be kept together until his return, unless they agreed upon a verdict before he went away, it will not be presumed that the verdict was produced by coercion when the evidence to support it was ample.

W. H. McHenry and L. Kinkead, for the appellant.

Milton Remley, attorney general, and Jesse A. Miller, for the state.

**27 GIVEN, J.** 1. The following statement of facts that appear in the record will make plain the questions to be considered: On and prior to September 24, 1893, the defendant, Mrs. C. V. Smith, resided in the city of Des Moines, and was engaged in the regular practice of medicine. On said day Ollie Newman, an unmarried woman, aged twenty-three, residing at the town of Swan, and with whom and her family the defendant had been intimately acquainted for many years, came to the defendant for treatment. Ollie Newman was then advanced between five and six months in pregnancy. She remained in the defendant's home, and under her care and treatment, for three weeks from and after said September 24th. On the morning of September 25th, the defendant commenced treating Ollie Newman. On the morning of October 5th, Ollie Newman had a miscarriage, and the controlling contention is, whether the treatment she received at the hands of the defendant was intended to and did produce that miscarriage. According to the testimony of Ollie Newman, she was, aside from <sup>28</sup> her pregnancy, in a sound, healthy condition at the time she came to the defendant, and no attempt had been previously made to produce a miscarriage. She testifies that certain instruments and medicines were used upon her by the defendant for the purpose of producing a miscarriage, and that a miscarriage followed their use. The defendant testifies that when Ollie Newman came to her for treatment she was in a deranged condition; "that the uterus was sore, swollen, and very much inflamed, and it looked like it had been punctured in the mouth of it, and all around the sides"; and that it was "tipped," the parts swollen, and a discharge coming therefrom. She admits the use of some kind of instruments named by Ollie Newman, but she testifies that they were used in a different way, and for a different purpose, from that stated by her. She described the treatment which she administered, and says it was proper treatment, under the conditions, to prevent a miscarriage. Several experienced physicians confirm her in this statement as to the propriety of the treatment, under conditions such as she states existed, while one or two others condemn the treatment. On the fourth day of October, defendant found the head of the foetus in the vagina, and that it had commenced to leave the uterus; and believing that a miscarriage could not then be prevented, and that the obstruction must be removed, and having no instruments, she sent for Dr. Maple. On coming, Dr. Maple refused to have anything to do with the case. Defendant testifies that Dr. Maple advised that nature be allowed to take her course. It does not appear that after Dr. Maple's visit, on the



evening of the 4th, anything further was done to either prevent or produce a miscarriage. The miscarriage occurred on the morning of the 5th.

2. Appellant complains in argument of numerous rulings of the court in taking the testimony, and, <sup>29</sup> in argument, refers to the motion for new trial as showing exceptions to the rulings. An examination of the abstract fails to show either objections or exceptions in many of these instances, and most of the objections urged in argument are to rulings that were manifestly correct, or without prejudice to the appellant. The following questions are so presented in the record as to require consideration: The state called Dr. Maple, for whom the defendant had sent on the evening of October 24th, and who after stating that he went to defendant's house on that evening, and that the defendant was there, was asked as follows: "Now you may state what you saw and did there in her presence." The question evidently refers to the defendant, Mrs. Smith, as no other person had been previously mentioned. The defendant objected, on the ground "that the things he saw, and the conversation he had with this defendant, upon the occasion of the visit mentioned by him, were confidential, and that the knowledge he obtained upon that occasion was obtained in his capacity of a physician." The county attorney announced that Ollie Newman "waives any question of privilege, and consents that the testimony of the witness now on the stand may be fully given. I am authorized to say so, am I not?" Ollie Newman: "Yes, sir." The court ruled as follows: "Doctor, the ruling of the court is to this effect: That communications between you and the defendant, Mrs. Smith, are not privileged. It would not come under the head of privileged communications between a physician and a patient, and you can answer accordingly." Thereupon Dr. Maple testified as follows: "I went into the room, and took off my overcoat, and laid down my instruments. Mrs. Smith told me that she had a friend from the southern part of the state; that she came there to be treated; that she was in the family way, and was to be married to a man in <sup>30</sup> Pennsylvania, and must get out of this fix before she was to be married. She wanted that I should go into the room and examine the patient, and I refused to go. She told me that the girl was sick. I told her that I would have nothing to do with the case. I went into the other room, and put on my coat." Section 3643 of the code is as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him

in his professional capacity, and necessary and proper to enable him to discharge the functions of his office, according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made, waives the rights conferred." The communication testified to was not from Ollie Newman, nor did the relation of physician and patient exist between Dr. Maple and her, as the doctor declined to have anything to do with the case. The prohibition of said section was, therefore, not in the favor of Ollie Newman, and she could not waive the same. The prohibition of the statute is not limited to communications with the patient, but applies to all communications of the character indicated in the statute, from whatever source, and is surely applicable, in all its force, to communications between physicians attending, or consulting, in the same case. The question is, whether the communication from the defendant to Dr. Maple, testified to by him, was a communication properly intrusted to him, and necessary and proper to enable him to discharge his duties as a physician. In *State v. Kidd*, 89 Iowa, 56, we held that "professional communications are not privileged, when such communications are for an unlawful purpose, having for their object the commission of crime": <sup>31</sup> Citing 19 Am. & Eng. Ency. of Law, 140, and cases therein cited. See, also, 1 Wharton on Evidence, sec. 590; *People v. Blakeley*, 4 Park. 176; *Hewitt v. Prime*, 21 Wend. 79; *Campau v. North*, 39 Mich. 606; 33 Am. Rep. 433; *State v. Hilmantel*, 23 Wis. 422; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 287. It is evident, from the undisputed facts and testimony of Dr. Maple, that the communication of the defendant to him was for an unlawful purpose, and had for its object the commission of a crime, and is therefore not privileged, under the statute.

3. Dr. A. H. Young was called on behalf of the defendant, and having stated that he was a physician, that he had known Ollie Newman since 1891, and had been called to treat her professionally in the early part of 1892, was asked as follows: "For what did you treat her?" The state objected as irrelevant and immaterial, which objection was sustained; and thereupon defendant's counsel stated that he offers to prove by Dr. Young that he had consulted and treated Ollie Newman in the year 1892; "that she came to him, and upon examination he found upon the uterus certain punctures and bruises, and that the uterus and vagina were inflamed and swollen, and that there was more or less discharge from it; that there followed a premature birth of the foetus; and that, in his judgment as a physician, that premature birth was caused by the insertion of a certain

wire instrument into the mouth of the uterus." The county attorney announced, "I am inclined under the suggestion of the court, to withdraw the objection, and let the evidence go in, subject to the right to strike it out if incompetent, and I offer to do so now." Thereupon Mr. McHenry, counsel for defendant, said: "I have got the offer in the record now, and I am not compelled to seesaw back and forth all day. I have made this offer, and it is upon the record, and I now decline to call this witness for this purpose any more." <sup>32</sup> Whereupon the court announced: "The offer is denied, and the defendant excepts." The record shows that a lengthy colloquy followed between counsel, but it will be seen from what we have said that defendant declined to call the witness after the state had withdrawn the objection, and must therefore be held to have waived the right to further examine Dr. Young. Counsel discuss at length the question of the admissibility of the proposed proof, but, under the record, we are not called upon to consider that question. Defendant's counsel having declined to further examine the witness, there was no prejudicial error in denying the offer.

4. C. F. Irish, official reporter of the court, was called upon the part of the state, and testified that he reported the Weston case, including the testimony of Orange Drake, and of this defendant, given on that trial, and that he had his notes of that testimony before him. Mr. Irish was asked whether Orange Drake was inquired of on that trial as to the general reputation of Ollie Newman for morals. Thereupon, defendant's counsel inquired, "Mr. Irish, do you remember, independently of your notes, the transactions inquired about?" To this Mr. Irish answered, "No, sir; I do not." Mr. McHenry: "You have to depend entirely upon your shorthand notes?" "Yes, sir." Thereupon defendant's counsel objected, as immaterial, irrelevant, and incompetent, which objection was overruled, and Mr. Irish proceeded to testify to statements made by Orange Drake and by this defendant on the trial of Weston. Objections like this are of frequent occurrence, and seem to call for a definite statement of the rule applicable to such cases. It is sometimes said that, as the use of stenographic reports in the trial of cases is of modern origin, some new rule should be declared; but not so, we think, as a proper understanding of old and well-established rules <sup>33</sup> is plainly applicable to such questions. Mr. Greenleaf, in his work on Evidence, fourteenth edition, section 436, states the rule as follows: "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he



is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak of the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for if inadmissible in itself, as for want of a stamp, it may be referred to by the witness. But where the witness neither recollects the facts, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said." In section 437 the cases in which writings are permitted to be used to assist memory are divided into three classes, namely: "1. Where the writing is used only for the purpose of assisting the memory of the witness; 2. Where the witness recollects having seen the writing before, and, though he has no independent recollection of the facts mentioned in it, yet remembers at the time he saw it he knew the contents to be correct; 3. Where the writing in question neither is recognized by the witness as <sup>34</sup> one which he remembers to have seen before, nor awakens his memory to the recollection of anything in it, but nevertheless, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively as to the fact." The writing to which Mr. Irish referred was the shorthand notes made by himself as official reporter. It was his duty to make these notes correctly, and it must be presumed that they were so made. It is certainly clear that under these facts it was competent for Mr. Irish to testify from his notes as to the matter inquired about, under the second rule as above stated, notwithstanding he had no independent recollection of the facts. That the shorthand notes were not intelligible to persons generally does not remove the application of the rule, any more than if they had been written in a foreign language. There was no error in overruling the objection.

5. Appellant contends that the verdict is contrary to the evidence and the instructions of the court. The instructions are

not before us, and we can therefore only inquire as to whether the verdict is contrary to the evidence. In this connection, it is claimed that, under the law, Ollie Newman is an accomplice, and therefore the defendant cannot be convicted, under her testimony alone, unless she be corroborated, as provided in section 4559 of the code. No provision is made in section 3864 of the code for punishing a pregnant woman upon whom a criminal miscarriage has been produced, and it certainly has never been held in this state that she is subject to punishment. The courts of many of the states have held that she is not an accomplice, and that corroboration of her evidence is not required to sustain a conviction: See *Commonwealth v. Boynton*, 116 Mass. 343; *Commonwealth v. Wood*, 11 Gray, 85; *Watson v. State*, 9 Tex. App. 237; *Dunn v. People*, 29 N. Y. 523; 86 Am. Dec. 319; *People v. Vedder*, 34 Hun, 280. *People v. Josselyn*, 39 Cal. 398, is cited, but that case rests upon a statute providing that one charged with this crime cannot be convicted upon the testimony alone of the woman upon whom the crime was performed. While we are of the opinion that Ollie Newman is not within the rule of the statute as to corroboration, if that rule may be applied she is abundantly corroborated in her evidence tending "to connect the defendant with the commission of the offense." There can be no question but that Ollie Newman came to the defendant for the purpose of having a miscarriage produced; that the defendant, knowing that fact, proceeded to treat her; and that a miscarriage followed the treatment. There is really but one disputed fact in the case, and that is, whether the defendant administered the treatment for the purpose and in a manner to prevent or to produce the miscarriage. The testimony of William Weston and of Dr. Maple leaves no doubt upon the subject. It is also claimed, in this connection, that the verdict was the result of coercion, and not the deliberate judgment of the jury. It appears that the jury retired about 3 o'clock Friday, and returned their verdict about 4 o'clock next day; that some of the jurors learned, through the bailiff in charge, that the judge presiding was going away at noon on Monday following, and some of the jurors were led to understand that the jury would be held together until Monday unless they agreed sooner. There is nothing whatever to show that the jury was influenced in its conclusion by this rumor, and we do not think the defendant was prejudiced by it. In view of the state of the testimony, and the length of time the jury deliberated, we think it clear that their conclusion was not influenced by any other considera-

tion than the evidence and instructions. We think from the record before us that the appellant had a <sup>36</sup> full and fair trial, that there was no prejudicial error in any of the rulings of the court complained of, and that the verdict is fully sustained by the evidence. The judgment of the district court is, therefore, affirmed.

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**WITNESSES—PHYSICIAN WHEN PRIVILEGED FROM TESTIFYING.**—It has been held that a physician consulted by the defendant as to the means of producing an abortion is not privileged from testifying: Monographic note to *Thompson v. Ish*, 17 Am. St. Rep. 571, on when a physician may and when he may not testify.

**WITNESSES—USE OF MEMORANDA TO REFRESH MEMORY.**—Testimony based on a witness' own writing will be received if, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively to the fact therein stated; and this, although he may not recognize the instrument as one he had seen before, or remember anything contained in it: Note to *Curtis v. Bradley*, 48 Am. St. Rep. 191. See monographic note to *State v. Bacon*, 98 Am. Dec. 619-623, on the use of memoranda by witness to refresh or assist memory.

**NEW TRIAL—WHEN GRANTED BECAUSE OF COMMUNICATIONS MADE TO JURORS.**—It is the duty of the officer having charge of a jury, after they have retired for deliberation, to refrain from communicating with them, except for the purpose of inquiring if they have agreed, and a breach of such duty has been held sufficient to justify the granting of a new trial. Thus, where the sheriff stated to the jury that if they did not soon agree the judge would carry them off into another county, a new trial was granted: Monographic note to *Hilton v. Southwick*, 35 Am. Dec. 255; extended note to *Bradbury v. Cony*, 16 Am. Rep. 454, 455. See, also, *Sargent v. Roberts*, 1 Pick. 337; 11 Am. Dec. 185; *Read v. Cambridge*, 124 Mass. 567; 26 Am. Rep. 690.

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## NASHUA TRUST COMPANY v. EDWARDS MANUFACTURING COMPANY.

[99 Iowa, 109.]

**MORTGAGE.—AN ASSIGNMENT OF A MORTGAGE, THOUGH UNRECORDED,** is good against all persons except subsequent purchasers for value without notice. The holder of a mechanic's lien is not as against such assignee to be deemed a purchaser.

**MECHANIC'S LIEN, CONFLICT BETWEEN AND UNRECORDED ENCUMBRANCES.**—Mechanics' lienholders are not purchasers, and must, at their peril, take notice of all liens and encumbrances, whether recorded or not. Hence, if a lien is foreclosed without making a prior encumbrancer a party, his encumbrance remains paramount to the mechanic's lien until there has been a sale under the judgment foreclosing the lien to a purchaser having no knowledge of the prior encumbrance.

**PARTIES, PRIVACY BETWEEN.—AN ASSIGNOR** is not in privity with his assignee as to facts transpiring after the assignment. Therefore a judgment against a mortgagee foreclosing a mechanic's lien does not bind his assignee holding under a prior unrecorded assignment.



Ross & Ross, for the appellant.

Smith McPherson, Thomas Hysham, and Stone & Dawson, for the appellee.

<sup>110</sup> GIVEN, J. 1. There is no dispute as to the facts out of which this contention grows, and they are as follows: On June 11, 1890, the defendants Marcus C. Patrick and Viola Patrick executed and delivered this bond and mortgage to the defendant the Kimball-Champ Investment Company. The bond is for twenty-five thousand dollars, and payable "to the order of the Kimball-Champ Investment Company." The mortgage is upon the south one hundred feet of lot 13, block 7, in Bayliss' first addition to the city of Council Bluffs, Iowa, being fifty feet on First avenue, and running back same width one hundred feet, and was filed for record on the nineteenth day of June, 1890. On the same day—June 19, 1890—the Kimball-Champ Investment Company, for value received, sold and assigned in writing said mortgage, and the debt secured thereby, to the plaintiff, which assignment was filed for record March 11, 1892. On the nineteenth day of September, 1891, this appellant, as plaintiff, commenced an action against Kimball & Champ, Kimball-Champ Investment Company, and others, as defendants, to recover a judgment on account against Kimball & Champ, and for the establishment and foreclosure of a mechanic's lien as to said lot 13 and other lots. Said cause was submitted on the eighth day of February, 1892, and on June 2, 1892, judgment was rendered in favor of the plaintiff therein, and a decree entered establishing and foreclosing a mechanic's lien in its favor as to the said lot 13. The only evidence offered on the submission of this cause below was the bond, mortgage, and assignment thereof, on behalf of the plaintiff; and, on behalf of the defendant, the decree in said former action, and <sup>111</sup> evidence which shows quite conclusively that at the commencement of said former action this appellant had no notice, actual or constructive, of said assignment of this bond and mortgage. It will be observed that this mortgage was on record before the commencement of said action, that the mortgagee was made a party to that action, and that appellant, having no notice of said assignment, this plaintiff, though then owning the bond and mortgage under the assignment, was not made a party to said action. It will also be observed that said assignment was not filed for record until after said cause was submitted, but was filed before the decree was rendered; also that this action was commenced after the submission and before decree. Appellant asks in this action that

plaintiff, because of said decree, be denied the relief asked as against appellant; that the amount due appellant upon said judgment be first paid out of the proceeds of the sale of said property, and that the lien of the plaintiff be postponed to that of the defendant.

2. By the decree set up by appellant its mechanic's lien was established and foreclosed, as to said lot 13, "as against all of the defendants to this action." As appellee was not a defendant to that action, the question presented on this appeal is whether he is bound by that decree. Appellant insists in argument that its mechanic's lien is entitled to priority over plaintiff's mortgage under the provisions of subdivision 3, section 3317, of McClain's Code, and the facts as assumed in the argument. This question of priority is not before us. Appellee has neither alleged nor proven facts, beyond those appearing in the record in the former case, upon which this question of priority must be determined. It rests its defense solely upon said decree. If appellee is bound thereby, then the question of priority is adjudicated; but, if not bound thereby, it can only be determined upon <sup>112</sup> proper allegation and proof of the fact as to whether appellee's mortgage was made subsequent to the commencement of the building, erection, or improvement on lot 13. Appellant contends correctly that by the foreclosure it did not waive its lien, and that in bringing said action it was not required to look beyond the liens recorded; but the question remains whether appellee is bound by said decree. The written assignment of the bond and mortgage to appellee is an instrument conveying real estate, within the meaning of the recording act: *Bank of Indiana v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Bowling v. Cook*, 39 Iowa, 200; *Fletcher v. Kelly*, 88 Iowa, 485. This assignment, therefore, though unrecorded, is good as against all persons except subsequent purchasers for value without notice. We have seen that appellant acquired its mechanic's lien and brought said action without notice of this assignment, but we inquire whether, as the holder of such a lien, it was a purchaser within the meaning of the law. That its lien had been foreclosed did not waive it nor enlarge it, beyond the fact that appellant was entitled to special execution. Appellant's interest in lot 13, under its lien, was not greater nor different from that which a judgment lienholder would have, or an attaching creditor who had prosecuted his claim to judgment and order for special execution. In *Fletcher v. Kelly*, 88 Iowa, 485, it is said, as to mechanic's lienholders: "He is not a purchaser; no more so than a judgment creditor; and hence must, at his peril,

take notice of all liens and encumbrances, whether recorded or not. His lien attaches to the real estate, subject to all outstanding equities, whether he had notice of them or not, except in so far as this rule may be modified by the mechanic's lien statute." The modification referred to is as to notice, but not as to whether he is a purchaser or not. The lienholder does not become a purchaser by bringing his action <sup>113</sup> for and obtaining foreclosure of his lien; but, if the property is put to sale under the decree, and bid in by the lienholder, then, and then only, does he become a purchaser. We are clearly of the opinion that appellant was not a subsequent purchaser, within the meaning of the recording act, and therefore the written assignment to appellee, though unrecorded, is valid as to appellant.

3. It is insisted that, as appellee's assignor, the Kimball-Champ Investment Company, was a party to that action, the appellant is bound by said decree. By the assignment of the bond and mortgage the assignor parted with all rights therein, and appellee became invested therewith, and thereafter there was no community of interest between them. An assignor is not in privity with his assignee as to matters transpiring after the assignment. Appellant cites and relies on *Reel v. Wilson*, 64 Iowa, 13. In that case Frum gave a first mortgage to Benedict and a second to Perry, both of which were recorded. Perry transferred his mortgage to Reel without any writing, and there was nothing of record to show the transfer, and no evidence that Benedict had notice thereof. Benedict foreclosed as against Frum and Perry, and defendant Wilson acquired a sheriff's deed under execution sale made on that judgment. Reel commenced his action against Frum and Perry to foreclose the second mortgage, and took decree, but no execution was issued thereon. Thereafter Reel commenced the action against Wilson to redeem them from the sale to him, and this court held: "That the decree in the Benedict foreclosure left plaintiff no right of redemption except such as was conferred on him by statute. To hold otherwise would have required Benedict to go beyond the records, and out into the world, in search of the owner of the notes secured by the Perry mortgage." The distinction between that case and this is, that <sup>114</sup> Wilson was a subsequent purchaser, while, as we have seen, in this the appellant is not. Our conclusion is, that appellee is not concluded by said decree, and that, in the absence of allegation and proof showing that appellant's claim is entitled to priority under said section 3317, appellee is entitled to the decree rendered in this action. In this decree the court gave appellant ten days in which to file an amended and substituted



pleading. In such a pleading it could have alleged the facts relied on as entitling its claim to priority, but it elected to stand upon said decree as conclusive against appellee, and as its sole defense, and cannot now be heard to ask an adjudication on that question in this case. The conclusion we have reached finds support in the following cases: *Dickerman v. Lust*, 66 Iowa, 444; *Hodson v. Treat*, 7 Wis. 266; *Green v. Dixon*, 9 Wis. 532; *Prouty v. Tallman*, 65 Iowa, 354; *Chase v. Kaynor*, 78 Iowa, 449.

4. Appellant complains of the form of the decree, in that, as is said, "The relief granted in the court below is a strict foreclosure, without time or opportunity for redemption." Appellant having stood upon the former decree as an adjudication against appellee, and having refused to plead on the merits as to the question of priority, this decree is final on that question; but we do not think it was intended to, nor that it does, deny to appellant its statutory right of redemption. Our conclusion upon the entire record is that the decree of the district court should be affirmed.

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**MORTGAGE—ASSIGNMENT OF—NONRECORD.**—If the holder of a note and mortgage borrows money thereon, delivering them to his creditor as collateral security, no record of such assignment or pledge is necessary except as against a subsequent bona fide purchaser of the mortgage: *Curtis v. Moore*, 152 N. Y. 159; 57 Am. St. Rep. 506, and note.

**MECHANIC'S LIEN—PRIORITY BETWEEN, AND MORTGAGE.**—A lien for labor and materials is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxtun etc. Heater Co. v. Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note. The lien begins when the work is commenced, and has precedence over a mortgage executed subsequently to that time: *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607; 51 Am. St. Rep. 925, and note; *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574; 53 Am. St. Rep. 790, and note. See *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779, and note.

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## LEONARD v. OLSON.

[99 IOWA, 162.]

**NEGOTIABLE INSTRUMENTS.—THE INDORSEMENT OF A NEGOTIABLE INSTRUMENT PAYABLE ON DEMAND** is presumed to have been made on the day the instrument was executed.

**NEGOTIABLE INSTRUMENTS.—A PROMISSORY NOTE PAYABLE ON DEMAND** will be considered overdue and dishonored unless payment is in some manner demanded within a reasonable time.

**NEGOTIABLE INSTRUMENTS PAYABLE ON DEMAND,** whether with or without interest, mature as to the indorser thereof

only when payment is demanded, and it must be demanded within a reasonable time.

**NEGOTIABLE INSTRUMENTS, MAKER'S ABSENCE FROM THE STATE.**—If the maker of a note payable on demand immediately removes from the state in which it was executed, demand for payment is not necessary to charge the indorser, but he must be notified of the dishonor of the note and that payment had not been demanded because of the maker's absence.

**NEGOTIABLE INSTRUMENT—INSOLVENCY OF MAKER DOES NOT EXCUSE NOTICE OF DISHONOR.**—The fact that the maker of a note was insolvent at its execution and ever afterward does not prevent the release of the indorser by the failure of the holder to give due notice of dishonor.

**NEGOTIABLE INSTRUMENT.—DEMAND AND NOTICE OF DISHONOR** made and given ten years after the execution of a negotiable promissory note payable on demand with interest payable annually are not made and given within a reasonable time, though the maker has been insolvent and absent from the state ever since the execution of the note.

**NOTE OR BILL OF EXCHANGE MADE OR ACCEPTED PAYABLE AT A PARTICULAR PLACE** is to be treated as payable generally, unless expressly made payable at that particular place alone. It is idle to make it payable in a particular city without naming some house or bank at which it is to be paid.

R. M. Wright and Tait & Jackson, for the appellants.

W. H. Hart and S. M. Elwood, for the appellee.

**167** GIVEN, J. Plaintiffs seek by this action to charge the defendant as indorser of the note set out, which note and indorsement are as follows:

**168** "\$2,225.00.

Dayton, Iowa, Jan. 22nd, 1884.

"On demand, — after date, for value received, we promise to pay to Jonas O. Olson, or order, twenty-two hundred and twenty-five dollars, at Dayton, Iowa, with interest at ten per cent per annum, payable annually. And interest in arrears shall draw ten per cent till paid, and, in case of nonpayment of interest when due, the whole sum of principal and interest to become due and collectible at the holder's option. And in any action that may be brought for any sum due under the provisions of this note, by the holder hereof, he shall be entitled to recover of the maker hereof, a reasonable sum as attorney fees, to be fixed by court.

"M. OLSON,

"No. —. Due —.

"C. M. OLSON.

"Pay Arah Leonard, Saml. Burnquist, Louis Ericson, Miles Allen, Lars Poulson, or order.

"JONAS O. OLSON."

It will be observed that this note is payable on demand, after date, at Dayton, Iowa, is dated January 22, 1884, and provides

for interest at ten per cent per annum, payable annually, and for interest on arrears of interest. The indorsement by appellee is without date, and it is not questioned but that under the decisions it is presumed that the note was assigned on the day it was executed: *Hayward v. Munger*, 14 Iowa, 517.

It is alleged in the petition "that on the thirteenth and sixteenth days of January, A. D. 1894, demand was made for the payment of the note sued on, upon the makers thereof, and payment was refused, and notice of such demand and such refusal was on said days duly given to this defendant, and said note was duly protested for nonpayment thereof; and said plaintiffs are the owners of said note, and the same is wholly unpaid, <sup>169</sup> except as has been hereinbefore stated." Appellant contends for the rule "that an interest bearing demand note is a continuing security, and that the same, providing that it be still a subsisting claim against the maker, is not due, in so far as the indorser is concerned, until demand has been made." Applying this rule, it is insisted that the demand, protest, and notice alleged are sufficient to charge appellee as indorser. Appellee contends "that, to charge the indorser of the note sued on in this action, said note should have been presented at once after maturity, payment demanded, protest for nonpayment, and notice of dishonor given the indorser not later than the following day"; also, "that a demand note is due forthwith." Relying upon this as the rule, he contends that he is not liable under the allegations of the petition as to demand, protest, and notice. An examination of the authorities cited, as well as of many others, confirms the statement of counsel that there is much diversity of opinion as to the rule in such cases.

Some courts have held that such a note is due the day it is made, and that, in order to charge the indorser, the rule was exactly the same as in the case of a note due on a day certain—that demand must be made at once, the note protested for nonpayment, and notice given not later than the following day. Other courts held that, in order to charge the indorser, payment must be demanded, the note protested, and notice given to the indorser within a reasonable time; while others held that an interest bearing demand note is a continuing security, and that, so long as it is a subsisting claim against the maker, it is not due, so far as the indorser is concerned, until demand has been made. We do not find that this court has ever passed upon this question, and, therefore, we have examined with care the many authorities upon that subject. They are numerous and somewhat conflicting, and we <sup>170</sup> will not attempt to quote from or cite



them at length, but only such as seem necessary to make plain the conclusion we reach. There is some conflict in the decisions as to when such a note becomes due as to the maker, but, as our inquiry is when it becomes due as to the indorser, we need not inquire as to the maker. It has been held by the courts of England that a negotiable note payable on demand, with interest, does not become overdue by mere lapse of time, but is a continuing security: *Barough v. White*, 4 Barn. & C. 325; *Brooks v. Mitchell*, 9 Mees. & W. 14. In *Merritt v. Todd*, 23 N. Y. 29, 80 Am. Dec. 243, it is held that a "promissory note, payable on demand, with interest, is a continuing security. An indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time." It is upon these authorities that appellant mainly relies, and, if they announce the better doctrine, the appellant's contention must be sustained. The case of *Merritt v. Todd*, 23 N. Y. 29, 80 Am. Dec. 243, has been the subject of criticism in later decisions by that court, and the doctrine therein announced is adhered to because of its being so long acquiesced in, rather than because of its announcing the better rule: See *Shutts v. Fingar*, 100 N. Y. 541; 53 Am. Rep. 231; *Payne v. Gardiner*, 29 N. Y. 146; *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. 519; 7 Am. Rep. 478; *Pardee v. Fish*, 60 N. Y. 266; 19 Am. Rep. 176; *Crim v. Starkweather*, 38 N. Y. 339; 42 Am. Rep. 250; *Parker v. Stroud*, 98 N. Y. 380; 50 Am. Rep. 685. The case of *Merritt v. Todd*, 23 N. Y. 29, 80 Am. Dec. 243, has been expressly repudiated in Louisiana, in *Thielman v. Gueble*, 32 La. Ann. 260; 36 Am. Rep. 267. It is said of this case that it differs from the entire current authorities, was decided by a divided court, and its correctness questioned. "However, even did its reasoning raise a doubt in our minds as to the correctness of the general commercial law, we would hesitate long before departing from the general rule <sup>171</sup> of the law merchant on the authority of one decision, which has been aptly said was a departure from every case in this country previously decided on the same point": Citing *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461. The same view is taken of the case in *Turner v. Iron Chief Min. Co.*, 74 Wis. 355; 17 Am. St. Rep. 168. In *Thielman v. Gueble*, 32 La. Ann. 260, 36 Am. Rep. 267, it is said: "The universal rule, we take it, is that a demand note must be presented within a reasonable time; and, while the textwriters and books are full of cases wherein the question of what constitutes reasonable time is discussed, we have been referred to no authority, except one

case (*Merritt v. Todd*, 23 N. Y. 29, 80 Am. Dec. 243), questioning the general rule that reasonable time is the criterion by which to fix the period of presentment on demand notes": Citing many authorities. In the case of *Turner*, the court of Wisconsin says: "This ruling seems to be in harmony with the current of authority in this country, as appears from the valuable notes by Mr. Freeman in *Merritt v. Todd*, 80 Am. Dec. 250-254." In those notes it is said in respect to the rule announced in *Merritt v. Todd*, 80 Am. Dec. 250-254: "But in this country the rule is modified, and the general doctrine seems to be that a promissory note, payable on demand, will be considered overdue and dishonored unless payment is in some manner demanded within a reasonable time": Citing *Carll v. Brown*, 2 Mich. 402; *Mudd v. Harper*, 1 Md. 110; 54 Am. Dec. 644; *Nevins v. Townsend*, 6 Conn. 5; *Thurston v. McKown*, 6 Mass. 428; *Field v. Nickerson*, 13 Mass. 138; *Ranger v. Cary*, 1 Met. 369; *Furman v. Haskin*, 2 Caines, 369; *Sice v. Cunningham*, 1 Cow. 410; *Sandford v. Mickles*, 4 Johns. 224; *Losee v. Dunkin*, 7 Johns. 70; 5 Am. Dec. 245; *Lockwood v. Crawford*, 18 Conn. 361. An examination of these cases shows that they fully sustain the statement in the note.

Following the general current of authorities and what we deem to be the better reasons, we hold that <sup>172</sup> a demand note, whether with or without interest, only matures, as to an indorser thereof, when payment is demanded, and that payment must be demanded within a reasonable time. What is a reasonable time has been the subject of much discussion, and no uniform rule has been or can be declared, as the question must be determined by the facts of the case. Where the facts are established, or where they are admitted, as on a demurrer, the question is one of law for the court. The time that elapsed in this case lacked but a few days of ten years, and we do not find any case holding that anything like such a length of time would be a reasonable time within which to demand payment. The demand alleged was not within a reasonable time.

2. One of the allegations stricken from plaintiffs' petition on defendant's motion is as follows: "That at once after the indorsement of the note sued on, and about the — day of February, 1884, the said Martin Olson and C. M. Olson, his wife, left the state of Iowa, and have never since resided in said state, but at said time became nonresidents thereof." Appellants contend that the removal of the makers at once from the state, and their continued residence out of the state, made demand, protest, and notice unnecessary to charge the indorser. Here,

again, we find conflict in the authorities; some holding that in such cases demand must be made at the last known place of residence within the state; for the reason that the maker may have made arrangements to meet his obligation at his previous domicile: *Wheeler v. Field*, 6 Met. 290; *Grafton Bank v. Cox*, 13 Gray, 503; 2 *Daniel on Negotiable Instruments*, 1145. In *McGruder v. Bank of Washington*, 9 Wheat. 600, the supreme court of the United States uses this language: "But the question of the recent removal into another jurisdiction is a new one, and one of some nicety. In case of original residence in a <sup>173</sup> state different from that of the indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another state, the holder shall be required to pursue the maker, is a question not without its difficulties. We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are oftener of more importance to the rules of law than their abstract justice. On this point there is no other rule that can be laid down which will not leave too much latitude as to place and distance, besides which it is consistent with analogy to other cases that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed; and although, from the contiguity, and, in some instances, reduced size, of the states, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier states, or vice versa, would be attended with all the hardships to a holder, especially one of the same state with the maker, that could result from crossing the British channel": See, also, *Gist v. Lybrand*, 3 Ohio, 307; 17 Am. Dec. 595; *Foster v. Julien*, 24 N. Y. 28; 80 Am. Dec. 320; *Cadwell v. Porter*, 17 N. H. 28; *Eaton v. McMahon*, 42 Wis. 484. In some of the cases it is said that a removal of the maker out of the state after the making of the note, and before its maturity, excuses the holder from presentment and demand. We have seen that, whatever the rule may be as to the makers, this note was not due as to the indorser until demand was made or excused, and, therefore, the removal as alleged was after the making of the note, and before its maturity. The rule best sustained by reason and authority is, "that such a removal is an excuse from actual <sup>174</sup> demand," unless the note is payable at a particular place, in which case demand must be made in that place. This note is payable at "Dayton,



Iowa." Edwards on Bills and Notes, page 158, uses this language: "And it is at length settled in England by the statute, and in this country by the general current of authorities, that a bill of exchange made or accepted, payable at a particular place, is to be treated as a bill payable generally, unless it is expressly made payable at that place alone. It is idle to make a bill of exchange payable in a particular city, without naming some house or bank at which it is to be paid; and, if the drawee does not reside in the city named as the place of payment, it is not at all necessary that the bill should be sent to that place, and there protested for nonpayment. The law requires no useless ceremony, and therefore the absence of the party from the place of payment dispenses with the necessity of going to the place where it is known the party cannot be found; but, if it be made payable at a particular place in the city, it is certainly necessary to present the note there for payment for the purpose of charging the indorser." While it is not alleged, as in *Whitely v. Allen*, 56 Iowa, 224, 41 Am. Rep. 99, that the makers left no one to represent them, yet we conclude that under the general current of authorities, and the facts alleged, plaintiffs were excused from making demand of payment. An examination of the opinion in *McGruder v. Bank of Washington*, 9 Wheat. 600, shows that the headnote wherein it is said, "It is sufficient to present the note at the former place of residence of the maker," is not sustained by the opinion: See, also, *Foster v. Julien*, 24 N. Y. 28; 80 Am. Dec. 320.

3. Appellants contend that, by reason of the removal and nonresidence of the makers of the note, they were also excused from giving appellee notice of nonpayment. The purpose of such notice is <sup>175</sup> to inform the indorser of the fact of nonpayment that he may proceed for his own protection, and it seems to us that the same reasons exist for giving the notice where, because of the facts, demand is excused, as when demand is made. In *Caldwell v. Porter*, 17 N. H. 28, it is said: "But the removal of the maker, which dispensed with the demand of payment, did not dispense with the notice required in general to be given to the indorser of the dishonored note." In section 1144 of 2 Daniel on Negotiable Instruments, it is said: "But the absconding of the drawee, acceptor, or maker is no excuse for want of notice to the drawer or indorser, who all the more need to be put upon their guard": Citing *May v. Coffin*, 4 Mass. 341. Recent decisions place an absconding debtor upon the same footing as one merely removed into another jurisdiction: *Pierce v. Cate*, 12 Cush. 190; 59 Am. Dec.

176. It is further said, in effect, that, under facts which excuse demand, "want of notice is altogether excused": Citing Story on Promissory Notes, sec. 356. To so say, we think, ignores the very purpose of such notice. In *Price v. Young*, 1 McCord, 340, it is said: "Where a demand cannot be made, the law does not dispense with notice. The circumstances which prevent it and the notice are still required. It was the duty of the holder in this case, admitting that a demand could not have been made, to have given the defendant notice, in as short a period after having ascertained that the demand could not be made as he could have been required to do if a demand had been made." Appellants being unable, by reason of the non-residence of the makers of the note, to make demand within a reasonable time, should have given notice of that fact, and the fact of nonpayment, to appellee within a reasonable time.

It is also alleged in that part of the petition stricken out that the makers of the note "are now, and at all times since the said indorsements have been, <sup>176</sup> insolvent." Appellants insist that this fact was a sufficient excuse for not making a demand and giving notice, because appellee was not prejudiced by such omission. In *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 22 Am. St. Rep. 742, it is said: "The claim that, because of insolvency and absence from the state of the makers of the notes when the greater number matured, demand of payment of these and notice of nonpayment were excused, is without merit. It was the duty of the appellants to present the notes as they matured, at the place fixed for payment, notwithstanding the insolvency of the makers when a portion thereof matured, and their removal from the state at a time thereafter, not definitely fixed." Surely, insolvency alone can never excuse demand and notice. |

Our conclusion is, that while the petition alleged facts sufficient to excuse demand, it shows no facts to excuse the failure to give notice of nonpayment within a reasonable time. Therefore, there was no error prejudicial to the appellants in sustaining appellee's motion to strike from the petition, and no error in sustaining appellee's demurrer to the petition. Affirmed.

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**NEGOTIABLE INSTRUMENTS PAYABLE ON DEMAND.**—Note payable on demand with interest is not a continuing security on which an indorser remains liable until actual demand; but, to charge the indorser, payment must be demanded of the maker within a reasonable time, and notice of such demand and of nonpayment given to the indorser: *Turner v. Iron Chief Min. Co.*, 74 Wis. 355; 17 Am. St. Rep. 168, and note; *Mudd v. Harper*, 1 Md. 110; 54 Am. Dec. 644; *Perry v. Green*, 19 N. J. L. 61; 38 Am. Dec. 536, and note. Indorser of a note payable on demand at a specified place is not liable until formal demand at that place: *Parker v. Stroud*, 98 N. Y.

379: 50 Am. Rep. 685. The question as to what is an unreasonable delay in presenting such note for payment has been variously decided: *Turner v. Iron Chief Min. Co.*, 74 Wis. 355; 17 Am. St. Rep. 168, and note; *Jones v. Robinson*, 11 Ark. 504; 54 Am. Dec. 212. See monographic note to *Merritt v. Todd*, 80 Am. Dec. 250-254.

**NEGOTIABLE INSTRUMENTS—DEMAND OF PAYMENT—INSOLVENCY OF MAKER.**—The maker's insolvency, although known to the indorser, does not excuse the holder of a note from demand and notice: *Sandford v. Dillaway*, 10 Mass. 52; 6 Am. Dec. 99; *Page v. Loud*, *Harper's L. R.* 269; 18 Am. Dec. 650, and note; *Farnum v. Fowle*, 12 Mass. 89; 7 Am. Dec. 35.

**NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.**—Naming a city at large as a place of payment is not such an indication of the place of payment as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover: *Montross v. Doak*, 7 Rob. 170; 41 Am. Dec. 278. But if a note be made payable at a particular place, demand at that place must be made to authorize recovery against either the maker or indorser: *Mellon v. Croghan*, 3 Mart., N. S., 423; 15 Am. Dec. 163. See extended note to *Galpin v. Hard*, 15 Am. Dec. 643, 644.

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## WISHARD v. HANSEN.

[99 Iowa, 307.]

**CORPORATIONS, STOCK ISSUED AT AN OVERVALUATION.**—Where the capital stock of a corporation is issued to one of its promoters or organizers for property taken at a gross overvaluation, the transaction is fraudulent as against creditors of the corporation if it be insolvent, and a stockholder who receives such stock with knowledge of the consideration paid for it is liable to such creditors on the stock he holds for the difference between its par value and the amount actually paid to the corporation for it. This is true not only of an original stockholder, but of those who acquire stock with knowledge of the facts.

**CORPORATIONS.—A STOCKHOLDER CANNOT ESCAPE LIABILITY** by a transfer to an insolvent assignee of stock issued for property accepted at a gross overvaluation.

**NOTICE, WHO CHARGEABLE WITH.**—Generally, a person is charged with the knowledge of such facts as he would have ascertained had he acted with reasonable diligence and prudence upon the information he possessed.

**CORPORATIONS, STOCKHOLDER, WHEN CHARGED WITH NOTICE THAT THE STOCK WAS NOT FULLY PAID UP.**—If a certificate of stock purports to be fully paid up, but nevertheless that it may be assessed to raise moneys to pay certain mortgage indebtedness, and also for improving the property of the corporation, and other necessary expenses, and the purchaser thereof knows the amount of the capital stock of the corporation and the value of its property and that the property which was the basis of the stock was of much less value than the amount of such capital stock, and is not shown to have believed that such property equaled the par value of the stock, the court is justified in finding that the purchase was made with knowledge that the stock had not been fully paid up and that the purchaser was liable for the residue.



McVey & Cheshire, for the appellant.

Berryhill & Henry, Dowell & Parrish, and Earl & Prouty, for the appellees.

<sup>309</sup> ROBINSON, J. The Zoological Park Company was organized in the year of 1889. At about the time it was organized, L. M. Mann was the owner of a tract of sixty-three acres of land, situated in the city of Des Moines, and a syndicate was formed Mann, under which he conveyed the land to the park company. and the purchase of the land. A contract was entered into with Mann, under which he conveyed the land to the park company. The consideration for the conveyance was twenty thousand dollars in money and real estate, furnished by the syndicate, and forty thousand dollars in bonds, secured by a mortgage on the property, issued by the park company, to Mann. Shares of the capital stock of the company to the amount of one hundred and twenty thousand dollars were issued to the members of the syndicate, for which they paid nothing at the time, excepting twenty thousand dollars, furnished in money and real estate, as stated. Assessments to the amount of eighteen and three-fourths per cent of the capital stock were afterward made and paid. The payment of money and real estate made by the syndicate amounted to sixteen and two-thirds per cent of the stock issued. It thus appears that less than thirty-six per cent of the amount for which stock was issued has been paid, and that is true of the stock in controversy. We think the district court was authorized to find that to be the case, even though the land, subject to the mortgage of forty thousand dollars, and not the money and <sup>310</sup> real estate to the amount of twenty thousand dollars, be regarded as the consideration paid for the stock, for the reason that it might have been found, under the evidence, that the value of the tract in excess of the mortgage was not more than twenty thousand dollars. The capital stock of the company was divided into shares of one hundred dollars each, and the twelve hundred to the syndicate and one hundred and twenty-six taken by the Des Moines Street Railway Company, were all that were issued. Thirty-four shares were apportioned to John J. Pederson, a member of the syndicate. He transferred them to the defendant, in October, 1890, and the certificates originally issued for them were surrendered, and a new one was issued to the defendant. He testifies that he paid for them a claim he held against Pederson for three hundred and eighty-five dollars, seven hundred and sixty-five dollars in money, five thousand dollars in railway supply stock, of a value

not shown, but taken at twenty-five cents on the dollar, and in May, 1891, gave Pederson a check for nineteen hundred dollars and nineteen cents. The defendant further testifies that he transferred the shares to J. C. Hansen, on the seventeenth day of June, 1893, although the transfer was not recorded in the books of the company until the latter part of February, 1894. The judgment upon which the Chicago Lumber Company relies appears to have been rendered for building material sold to the Park company for use in improving its grounds. The judgment upon which B. P. White seeks to recover was rendered on bonds which were issued to refund the bonds originally taken by Mann. The district court rendered judgment in favor of the intervenors for sums which amounted to two thousand one hundred and seventy-four dollars and fifty-five cents, besides <sup>311</sup> costs, or for about sixty-four per cent of the stock which the defendant had owned.

Section 1082 of the code is a part of the chapter in regard to corporations for pecuniary profit, and is as follows: "Neither anything in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual." Where the capital stock of a corporation is issued to one of its promoters and organizers for property which is taken at a gross overvaluation, the transaction is fraudulent as against creditors of the corporation if it be insolvent; and the stockholder who receives such stock with the knowledge of the consideration paid for it will be liable to such creditors, on the stock he holds, for the difference between its par value and the amount actually paid to the corporation for it. And this is true, not only of the original stockholder, but of those who acquire the stock with knowledge of the facts: *Osgood v. King*, 42 Iowa, 478; *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147; 59 Am. St. Rep. 362. It is also true that the holder of such stock cannot escape liability by transferring it to an insolvent assignee: 2 *Morawetz on Private Corporations*, secs. 858, 891. The district court was authorized to find from the evidence that the consideration paid for the stock in question, when issued, did not exceed one-sixth of its par value; that the entire amount thus far paid for it does not exceed thirty-six per cent of its par value; that the indebt-

edness on which the judgments in favor of the intervenors<sup>312</sup> were rendered existed while the defendant held the stock; that the park company was then insolvent; and that the assignee of the defendant is also insolvent. Proof of these facts and of others to which we have referred placed upon the defendant the burden of showing, if he could, that he was not liable on the claims of the intervenors.

It is claimed that he purchased the stock in question without knowing that full payment for it had not been made, and that he should be treated as an innocent purchaser. He testifies that Pederson told him at the time of the transaction that the stock was paid in full, and that he believed that to be true, and had no intimation to the contrary. If he paid par value for it, that fact tends to corroborate his testimony. It is said, however, that facts within his knowledge when he made the purchase were of such a character as to charge him with notice that the stock was not paid up; and whether the district court was authorized to find that such was the case is the next question we are required to determine. The certificate for the stock in question states that it was held "subject to the articles of incorporation of the company, and to the terms and conditions printed on the back hereof, which are hereby made a part of this certificate." On the back of the certificate was printed the following: "This stock is fully paid up, but may be assessed at such time and in such amounts as may be necessary to meet the several payments of principal and interest upon the mortgage encumbrance upon the lands and personal property owned by the company, as such payments become due; said mortgage encumbrance being for the sum of forty thousand dollars . . . . It may also be assessed for the purpose of improving said property, and for other necessary expenses of the company." The certificate also showed<sup>313</sup> that the capital stock of the company was two hundred thousand dollars. The defendant saw the form of the certificate before he made the purchase, and must be held to have known its contents. The language of the indorsement is peculiar, and well calculated to arrest attention. Although it stated that the stock was fully paid up, it provided for assessments. Those statements are conflicting on their face, for it is the general rule that the stockholder can be made liable only for so much of the par value of his stock as is unpaid: *Spense v. Iowa Valley Construction Co.*, 36 Iowa, 409; 23 Am. & Eng. Ency. of Law, 817; 1 Cook on Stocks and Stockholders, sec. 212, et seq; 1 Morawetz on Private Corporations, sec. 131. If the stock was fully paid up, the power to make assessments upon



it was dependent upon some authority not disclosed by the certificate. The evidence shows that the defendant had been on the land of the company before he purchased the stock, and, so far as it appears, he knew its value. The certificate informed him that it was mortgaged for an amount which was equal to two-thirds of that value. The only property owned by the company of which he had knowledge was the encumbered land and some animals, and he supposed that they were the basis of the stock. It is not shown he believed the value of that property to be equal to the par value of the stock, nor to any considerable part of it. He did not make any inquiry in regard to the stock before he purchased it. Although he resided in Des Moines, and was engaged in business within eight or ten blocks of the office of the company, he made no effort to ascertain for what the stock was issued, nor by what authority it was assessable. It is the general rule that a person is chargeable with the knowledge of such facts as he would have ascertained had he acted upon the information he possessed with reasonable <sup>314</sup> care and prudence: *English v. Waples*, 13 Iowa, 57; 16 Am. & Eng. Ency. of Law, 795; 3 Wait's Actions and Defenses, 448.

If the defendant paid for the stock in good faith the amount claimed, it may well be questioned whether he acted with the care which the law required for his own protection. Whether he was chargeable with knowledge of the fact that the stock was not fully paid up was a question of fact, and we are of the opinion that the finding of the court, which is entitled to the weight of a verdict of a jury, has such support in the evidence that we should not disturb it. The judgment of the district court is therefore affirmed.

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**NOTICE—WHAT CONSTITUTES.**—Knowledge of facts sufficient to put a man on inquiry as to the existence of other facts is equivalent to actual knowledge of those facts which such inquiry may, in all probability, disclose, if it is properly pursued: *Doran v. Dazey*, 5 N. Dak. 167; 57 Am. St. Rep. 550, and note.

**CORPORATIONS.—IF STOCK IS ISSUED WITHOUT THE SUBSCRIPTION THEREFOR BEING PAID** in full, and is afterward transferred, the purchaser becomes personally liable for the amount of such subscription remaining unpaid: *Visalia etc. R. R. Co. v. Hyde*, 110 Cal. 632; 52 Am. St. Rep. 136, and note: But a subscriber to the stock of a corporation, with notice that his stock is to be sold unless assessments are paid, cannot, after the corporation becomes insolvent, escape liability for the unpaid portion of his subscription by transferring it to a person incapable of assuming the liability: *Burt v. Real Estate Exchange*, 175 Pa. St. 619; 52 Am. St. Rep. 858, and note. See *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133, and note.

**CORPORATIONS—STOCK—PAYMENT FOR, IN OVERVALUED PROPERTY.**—If property contributed or paid for the capital stock of a corporation is not valued in good faith, a stockholder

may be compelled to respond to the creditors of the corporation for the par value of the stock less the actual value of the property taken in exchange for it: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133, and note. See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 819, 820.

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## GRAY v. ANDERSON.

[99 IOWA, 842.]

**BANKING—CHECKS, PAROL EVIDENCE TO VARY.**—Parol evidence is admissible to prove that at the time a check was drawn the parties thereto agreed that it should not be presented for payment to the drawee until a time fixed by them, in which event the payee is excused for delay in presenting it until the time so specified.

Action to recover damages for breach of a contract to sell and deliver hogs purchased by the plaintiffs of the defendant. The contract of sale was made December 19, 1893, and a check given to the State Bank of Manning for the amount of the purchase price. On the 29th of the same month, the check was presented for payment, but was dishonored, and has never been paid. The drawer did not have money in the bank, but it was claimed that the bank had agreed to honor his check regardless of the state of his account. The defendant, after dishonor of the check, sold the hogs to another person. Verdict and judgment for the defendant, and the plaintiff appealed.

B. I. Salinger, for the appellants.

Byers & Lockwood, for the appellee.

343 KINNE, J. 1. The court instructed the jury that the defendant must fail if the check was taken by him in payment for the hogs. It is contended that the evidence shows that it was so taken, and hence the question should not have been submitted to the jury, and that their special finding to the contrary is without support. Whether the check was taken as constituting a payment was, we think, under the evidence, properly submitted to the jury, and we discover no reason for setting aside their finding in that respect.

2. The court instructed that plaintiffs must prevail if the defendant failed to prove that the bank refused to pay the check on account of want of funds, or because it did not recognize the check as binding upon it; also, that defendant must fail if it appeared that the check was not paid when presented, because of an understanding between the defendant and the bank that

it should not be paid until a later date. There is no question that the evidence of Forsbeck and of the banker shows that an arrangement existed between Forsbeck and the bank, by which the latter was to pay the checks of the former, regardless of the fact as to whether Forsbeck had a balance in the bank or not. So, also, it appears from their testimony that the reason the check was not paid when it was presented was because of an understanding between them and the defendant that it should not be paid until January 1, 1894. The banker testifies that defendant so told him. However this may be, it is not very material, as we think the jury were fully warranted, from the "44 evidence, in finding that the check was not paid, for reasons other than an agreement that it should not be presented until a later date. There was in this, as in other respects, a conflict in the evidence; and, if the jury believed the defendant, the check was not paid, for the reason that the drawer had no funds in the bank to meet it.

3. Defendant claims that it was agreed at the time the check was given him that it need not be promptly presented, but might be presented at his pleasure. It is said that it was error to admit the evidence, as it tended to contradict the terms of the check itself. This evidence in no way violated the well-known rule as to changing or altering written instruments by parol evidence of contemporaneous transactions. It is always held that a verbal agreement between the payee and the drawer of a check, contemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a time agreed upon, may be shown, and, if established, is an excuse for a delay in presenting it until the time specified: *Daniel on Negotiable Instruments*, sec. 1598; *Woodruff v. Plant*, 41 Conn. 344; *Compton v. Gilman*, 19 W. Va. 312; 42 Am. Rep. 776; *Holmes v. Roe*, 62 Mich. 199; 4 Am. St. Rep. 844; *Pollard v. Bowen*, 57 Ind. 232; *Barclay v. Weaver*, 19 Pa. St. 396; 57 Am. Dec. 661.

4. Finally, it is urged that diligence was not used by the defendant in notifying Forsbeck. This question was submitted to the jury under proper instructions, and they have found against the plaintiff. We do not think we should disturb their finding. Affirmed.

Deemer, J., takes no part.

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CHECKS—ACTIONS UPON—EVIDENCE.—Parol evidence is admissible to vary the terms of a check: *Pack v. Thomas*, 13 Smedes & M. 11; 51 Am. Dec. 135; *Turnbull v. Bowyer*, 40 N. Y. 456; 100 Am. Dec. 523. See *Breneman v. Furniss*, 90 Pa. St. 186; 35 Am. Rep. 657. See monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.



## LAPORTE IMPROVEMENT COMPANY v. BROCK.

[99 Iowa, 485.]

**DAMAGES, MEASURE OF FOR FAILURE TO DELIVER PROPERTY SOLD.**—Where a contract to deliver goods at a specified price is broken and the price is not paid before the time for delivery, the proper measure of damages is the difference between the contract price and the market price at the time the delivery should have been made. This rule is not applicable where the property contracted for is designed for a special purpose known to the seller and cannot be readily procured in the market.

**DAMAGES, MEASURE OF FOR NONDELIVERY OF BUILDING MATERIAL.**—Where one who contracts to furnish bricks to be used in the construction of buildings has failed to deliver them at the time specified, he is not answerable for loss of rents caused to the other contracting party from the consequent delay in completing the building, where there is no allegation that other bricks could not have been readily purchased in the market.

**WARRANTY OF QUALITY, BREACH OF NOT WAIVED BY ACCEPTANCE.**—Where one contracts to furnish brick to be used in the construction of buildings, and that they shall be good building brick in every respect, he is answerable in damages if he furnished inferior brick. The acceptance and use of the brick do not constitute a waiver of the right to object to their quality nor of the right to recover the difference between the value of the bricks furnished and those agreed to be furnished.

Mullan & Pickett, for the appellant.

J. D. & C. Nichols, for the appellee.

486 **ROBINSON, J.** In March of the year of 1891, the parties to this action entered into an agreement in writing, of which the following is a copy: "This agreement, made and entered into this 14th day of March, 1891, by and between Charles Brock, of Benton county, Iowa, party of the first part, and the Laporte Improvement Company, of Black Hawk county, Iowa, witnesseth: That the said party of the first part hereby agrees to furnish the party of the second part one hundred and seventy-five thousand (175,000) bricks, or as many more as may be necessary to build or complete four (4) brick buildings now contemplated building by said improvement company in Laporte City, Black Hawk county, Iowa. Said party of the first part hereby agrees and guarantees the said brick shall be good building bricks in every respect, and that they shall be delivered to said improvement company, pitched to wagon, at or within one mile from the place of erection of said contemplated buildings in Laporte City, and that said bricks shall be so delivered to said Co. on or before the 15th day of June, 1891. And the said improvement company, in consideration of the faithful fulfillment of above agreement on the part of the party of the first

part, hereby agrees to pay the said Chas. Brock at the rate of six dollars and fifty cents (\$6.50) per <sup>487</sup> thousand bricks, as follows: When the first kiln, containing not less than one hundred thousand bricks (100,000), shall be burned and found according to agreement herein, promise to pay said Brock the sum of five hundred dollars (\$500.00), and, when a second like kiln is completed, to pay said Brock five hundred dollars (\$500.00) more, and the balance which may be due the said Brock under the agreement to be paid him on the completion of the brickwork of said contemplated buildings. Witness our hands and seals this 14th day of March, 1891. Chas. Brock. Laporte Improvement Co., by W. A. Walker, President. W. W. Hamilton, P. Bowman, Committee." Under this contract the defendant delivered to the plaintiff one hundred and ninety-two thousand eight hundred and eight bricks, the price of which, estimated according to the agreement, amounted to twelve hundred and fifty-three dollars and seventy-two cents. Of that amount the defendant has been paid one thousand dollars, and it is admitted that, if the plaintiff has no cause of action against the defendant, he is entitled to recover on his counterclaim the unpaid balance of two hundred and fifty-three dollars and seventy-two cents, with interest, and the judgment rendered in his favor was for that amount.

1. The fourth count of the petition, as amended, seeks to recover, for the failure of the defendant to furnish bricks at the time required by the agreement, the rental value of two storerooms contained in the building for the time they were vacant after the first day of September, 1891. The count avers that the buildings for which the defendant agreed to furnish bricks were to be erected to rent as storerooms, and that he had full knowledge of that fact when he entered into the agreement; that, if he had furnished the bricks at the time agreed upon, the buildings <sup>488</sup> would have been completed by the first day of September, 1891; that, relying upon this agreement, the plaintiff leased the two storerooms, but that the defendant failed to furnish the bricks as agreed, in consequence of which the completion of the buildings was delayed, and the plaintiff lost rents to the amount of two hundred dollars and eighty-two cents. Judgment for that amount is demanded. A demurrer to that count was sustained. The grounds of the demurrer were, in substance, that the loss of rents was not the natural or direct result of the alleged breach of contract, and not the damages contemplated by the parties when they entered into the agreement. It is the general and well-settled rule that

where a contract to deliver goods at a certain price is broken, and the price is not paid before the time for delivery, the proper measure of damages is the difference between the contract price and the market price at the time the delivery should have been made: *Cannon v. Folsom*, 2 Iowa, 110; 63 Am. Dec. 474; 1 *Sutherland on Damages*, 2d ed., secs. 46, 51. And the reason for this rule is that, if the goods are not delivered as required by the agreement, the purchaser, not having parted with his money, can go into the market and buy: *Boies v. Vincent*, 24 Iowa, 393; 2 *Benjamin on Sales*, sec. 1117. The general rule does not apply where the property contracted for is designed for a special purpose, known to the seller, and cannot be readily procured in the market. In such cases, where the seller fails to deliver the property, he is liable for such damages as naturally result from conditions known to him at the time his contract was made. Thus, the measure of damages for the breach of a contract to deliver machinery to be used in propelling a boat is the rental value of the boat while it cannot be used, in consequence of the breach: *Brownell v. Chapman*, 84 Iowa, 504; 35 Am. St. Rep. 326. See, also, *Novelty <sup>489</sup> Iron Works v. Capital City Oat Meal Co.*, 88 Iowa, 530; *Abbott v. Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193; *Vickery v. McCormick*, 117 Ind. 594; *Benton v. Fay*, 64 Ill. 417; *Parsons v. Sutton*, 66 N. Y. 98; 2 *Benjamin on Sales*, sec. 1335; 2d ed., 51; 1 *Sutherland on Damages*, 2d ed., secs. 663, 702. We are of the opinion that the sale in question falls under the general rule first stated. The petition does not show that the plaintiff could not readily purchase in the market the bricks it needed at the time the defendant failed to deliver them. That being the case, it must be presumed that they could have been so purchased, and that the damages which would result from a breach of the contract contemplated by the parties when they entered into it were the difference between the contract price and the market price at the time the breach of contract should occur. The demurrer was, therefore, properly sustained.

2. The plaintiff purchased at Shellsburg fifty-seven thousand bricks, at seven dollars and fifty cents per thousand, for use in completing the building, and now seeks to recover the difference between the contract price and the price paid for the bricks so obtained, or fifty-seven dollars. After all the evidence had been submitted, the court sustained a motion of the defendant to strike out all the testimony of witnesses which related to the purchase of bricks in Shellsburg, and the price paid therefor. The testimony thus stricken out showed the purchase of the



bricks in Shellsburg as stated, and that they were delivered at the buildings in Laporte; that the defendant had no bricks ready for use at that time; and that those purchased were needed, when obtained, to avoid delay in completing the building. It is not shown by direct evidence that other bricks could not have been purchased in <sup>490</sup> Laporte, nor that the price paid was the market price. The contract of the defendant required him to deliver the bricks on or before the fifteenth day of June, 1891; and it was stipulated by the parties during the trial that the fair market value in Laporte of bricks of the quality contracted for on that date, and when the bricks were delivered by the defendant, was six dollars and fifty cents per thousand. It is claimed by the defendant that it appears from this that the plaintiff is entitled to only nominal damages for his failure to deliver the bricks in question, and that the judgment on this count should not be reversed, even though the court erred in striking the testimony. The case of *Wire v. Foster*, 62 Iowa, 114, is cited in support of that claim. It is not our practice to reverse a judgment for an error which deprives the appellant of nominal damages only, and we should not be inclined to reverse the judgment in this case if no other questions were presented. But there was testimony—somewhat in the nature of conclusions, it is true, but given without objection—to the effect that it was necessary to purchase bricks in Shellsburg at the price stated, in order to prevent delay in completing the building, and the stipulation as to price only applied to June 15, 1891, and the time when defendant delivered bricks, not to the time of the Shellsburg purchase. In view of the conclusions we reach on another branch of the case, we are of the opinion that there should be a new trial on this count.

3. The evidence showed that the bricks delivered by the defendant were not good building brick, as required by his contract, but that they were of an inferior quality, poorly burned, and worth in Laporte only from four dollars and fifty cents to five dollars per thousand. The plaintiff seeks to recover the difference between the value of those which were delivered and <sup>491</sup> the same number of the quality demanded by the contract. The defendant contends that, although it specified the kind of bricks which were to be delivered, yet it provided that the quality of the bricks should be determined before delivery, and that by accepting the bricks the plaintiff waived the right to object to the quality. This was the theory upon which the motion to direct a verdict was sustained. We do not think it is sound. The provision of the contract which guarantees that the bricks

"shall be good building brick in every respect" does not rest upon any condition, but is absolute. The contract does not in terms, or by necessary implication, make the acceptance of the bricks conclusive evidence that they are of the kind and quality required by the contract. The provisions requiring payment of five hundred dollars when a kiln of one hundred thousand bricks shall have been burned and "found according to agreement," and the payment of the same amount "when a second like kiln is completed," fixed times when portions of the contract price should be due, but did not give to the mere acceptance of the bricks the effect of a waiver of the right of the plaintiff to object thereafter to their quality. Not only is this the proper interpretation of the contract, but the evidence tends strongly to show that there was no waiver in fact. No inspection of the first kiln was made until after several loads of the bricks had been hauled, they were poor and unsatisfactory, and members of the building committee which represented the plaintiff then made some investigation. They could not ascertain much in regard to the bricks, but were assured by the defendant that the interior ones would prove to be better than those which had been delivered. When the second kiln had been burned, representatives of the plaintiff examined it, but could ascertain but very little about the quality <sup>492</sup> of the bricks. One of the representatives expressed doubt as to the quality, but was assured by the defendant that nothing could be told in regard to it until the kiln was opened. The testimony given on this branch of the case was sufficient to show that nothing done on behalf of the plaintiff should be given the effect of a waiver of its right to insist upon the guaranty that good building bricks alone should be delivered. It was the right of the plaintiff to reject the bricks, or to accept them and recover damages sustained by the breach of contract: *Jackson v. Mott*, 16 Iowa, 263; 2 Benjamin on Sales, sec. 1348. It elected to accept the bricks and rely upon the guaranty of quality. The issues in regard to a breach of the guaranty should have been submitted to the jury.

4. The third count of the petition sought a recovery for the increase in the cost of laying the bricks furnished, caused by their inferior quality. No claim for such a recovery is made in this court, and it must be considered as abandoned. So far as the judgment of the district court is founded upon that, and the count to which the demurrer was sustained, it is affirmed. So far as it involves the issues presented by the other counts of the petition, it is reversed.

**SALES—WARRANTY OF QUALITY—ACCEPTANCE DOES NOT WAIVE.**—The right to recover damages for the breach of an express warranty of quality survives the acceptance of the goods by the vendee, whether the sale be regarded as executory or in praesenti. The vendee is under no obligation to return the goods: *Fairbank etc. Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753, and note; *Argersinger v. MacNaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687, and note; *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783, and note.

**DAMAGES—MEASURE OF, FOR FAILURE TO DELIVER PROPERTY SOLD.**—In an action for damages for a failure to deliver goods, where no part of the price has been paid, the measure of damages is the difference between the contract price and the market price of the goods at the time and place of delivery: *Theiss v. Weiss*, 166 Pa. St. 9; 45 Am. St. Rep. 638, and note; *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350, and note.

**DAMAGES—LOSS OF PROFITS AS.**—It is only when the loss is indisputable and the amount can be estimated with almost absolute certainty, that loss of profits forms the proper measure of damages: *Moulthrop v. Hyett*, 105 Ala. 493; 53 Am. St. Rep. 139, and extended note.

## HIGLEY v. BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILWAY COMPANY.

[99 IOWA, 503.]

**CARRIERS, RECOVERY FROM FOR EXCESSIVE CHARGES.**—If a carrier renders a bill to a shipper of eggs, and charges as for a specified weight for each case, and the shipper pays accordingly, this does not constitute a settlement which will bar a recovery for overcharges. Nor is it any defense to the action that the weights charged were based upon the averaging of a few cases weighed where this fact was unknown to the plaintiff, and, therefore, not the result of any agreement with him.

**ACCOUNT, CURRENT, OPEN, WHEN EXISTS.**—If a shipper of freight is for many years charged for excessive weight on articles shipped by him, and makes payment accordingly, the amounts due him for these overcharges constitute an open, current account constituting but one cause of action. The statute of limitations, therefore, is no defense until the last item is barred.

**A RECEIPT MAY BE VARIED BY PAROL EVIDENCE,** though not obtained by fraud or mistake. Hence, receipts given by a carrier to a shipper specifying the weights of the articles shipped do not preclude the latter, in an action to recover for overcharges, from proving by parol evidence that such weights were incorrectly designated in such receipts.

**PRACTICE, ANSWER WHEN NEED NOT BE ANSWERED.** If an answer avers a settlement between a plaintiff and a defendant respecting the matters in controversy, such answer need not be replied to under a statute requiring the plaintiff to reply "where some matter is alleged in the answer to which plaintiff claims to have a defense by reason of the existence of some fact which avoids the material allegation in the answer."

S. K. Tracy and J. C. Leonard, for the appellant.

Rickel & Crocker, for the appellees.



**504** KINNE, J. 1. Defendant complains because the court refused to give certain instructions asked, to the effect that if the plaintiffs and defendant estimated the weight of the freight, and settlements were for years made upon such estimates without objection, and if plaintiffs paid the charges based thereon, then plaintiffs cannot recover. Also, because the court, on its own motion, gave instructions upon this point not in harmony with those asked. The instruction asked **505** was properly refused, because not applicable to the facts as disclosed by the evidence. The evidence did not show, or tend to show, that plaintiffs ever agreed that the defendant might arrive at the weight of the freight by weighing some of the egg cases and cases of eggs, and averaging the balance of them. It does not appear that such custom of the defendant was known to plaintiffs. Furthermore, the evidence of the defendant's witnesses shows that the approximate weight of the cases of eggs was fifty-five pounds, and the weights charged for were more than that. Nor is the claim that settlements were made based upon such weights, arrived at by averages, well founded. No evidence appears in this record touching any agreement between the parties as to an agreed weight, or to any weight sanctioned by them as the weight that should be fixed upon the egg cases or cases of eggs. Indeed, we do not understand from the evidence of defendant's witnesses that they make any claim that any such agreement existed between the plaintiffs and defendant. We do not understand that any settlements were ever made between these shippers and the railway company. The facts appear to be that the company fixed its weights upon this freight, and the plaintiffs paid the bills. No doubt the plaintiffs might have protested against paying on the basis of these excessive weights, but they were not bound to do so: *Heiserman v. Burlington etc. Ry. Co.*, 63 Iowa, 736.

2. It is said that plaintiffs are barred as to all items dated prior to August 10, 1889. It is urged that the items did not constitute an open, running account: that each item was a distinct transaction. There was no settlement regarding the payment of these items of overcharges. They were never adjusted between the parties. We think these numerous items should be treated as constituting an open, **506** current account. There was no break, or interruption, in the account. As we have said, as to these claimed overcharges, the account was open. It was running, and constituted a connected series of transactions—more than two thousand three hundred of them: *Tucker v. Quimby*, 37 Iowa, 19. It has been held that a series of illegal

discriminations by a common carrier at different times against a shipper of goods constitutes but one cause of action: *Langdon v. New York etc. Ry. Co.*, 27 Abb. N. C. 166; 15 N. Y. Supp. 255. So mistakes in payment to a railroad company for carrying the mails are mistakes of fact, and, for the purpose of rectifying them, the items thereof constitute a running account: *Duval v. United States*, 25 Ct. of Cl. 46. And see, also, *Moser v. Crooks*, 32 Iowa, 172; *Wendeling v. Besser*, 31 Iowa, 248; *Mills v. Davies*, 42 Iowa, 98. If, as this court has held, items of board, furnished from day to day, constitute a continuous, open, current account, there seems no good reason for holding to a contrary rule as to items of money paid by reason of overcharges on freight. Treated as an open, current account, none of the plaintiffs' claim is barred.

3. Complaint is made because the court permitted the plaintiff to show that the weight of the eggs in cases, and of the egg cases, was other and different from that recited in the receipts given them. The contention of the defendant is, that before such a receipt can be varied by parol evidence, it must be averred that such receipt was obtained by fraud or mistake. Counsel cite us to no case sustaining such a doctrine, and it may well be doubted if any such can be found. A receipt is *prima facie* evidence, but may be contradicted by parol evidence: 1 *Greenleaf on Evidence*, sec. 305. If these receipts be considered bills of lading, they are nevertheless open to contradiction by parol evidence as to the fact of the weight of the goods recited therein: 507 1 *Greenleaf on Evidence*, sec. 305; *Garden Grove Bank v. Humeston etc. Ry. Co.*, 67 Iowa, 532; *Chapin v. Chicago etc. Ry. Co.*, 79 Iowa, 582.

4. It is said that, as plaintiffs did not file a reply to the defendant's amendment to its answer, in which it pleaded a settlement, the court should have instructed the jury that it was a complete defense, and that it erred in directing the jury not to consider the said defense. Our statute provides that there shall be no reply except: "1. Where a counterclaim is alleged; or 2. Where some matter is alleged in the answer to which plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer": Code, sec. 2665. It was, therefore, unnecessary to file a reply to the amendment. It was denied by operation of law. Nor was there any error in directing the jury not to consider the plea of a settlement, as there was no evidence tending to show a settlement. Discovering no error, the judgment below is affirmed.

**CARRIERS—EXCESSIVE FREIGHT CHARGES—RECOVERY OF.**—Where a common carrier having possession of goods refuses to deliver them except upon payment of excessive rates for carriage, contrary to the contract, and the owner is obliged to pay the money to get possession of the goods, and accordingly pays under protest, he may recover the money back. Or he may do so where the charge is in excess of that allowed by law: Note to *Mayor v. Lefferman*, 45 Am. Dec. 169. See monographic note to *Peters v. Railroad Co.*, 51 Am. Rep. 820-833; *Harmony v. Bingham*, 12 N. Y. 99; 62 Am. Dec. 142; *Chicago etc. R. R. Co. v. Wolcott*, 141 Ind. 267; 50 Am. St. Rep. 320, and note.

**LIMITATIONS OF ACTIONS—MUTUAL, OPEN ACCOUNT.**—The rule is now established by a course of decision too long to be broken in upon that a mutual open account shall not be deemed barred until the statute has run against the last item: Monographic note to *Norton v. Larco*, 89 Am. Dec. 80. See *The Victorian*, 24 Or. 121; 41 Am. St. Rep. 838, and note.

**EVIDENCE—PAROL TO VARY WRITTEN INSTRUMENTS—RECEIPTS.**—A mere receipt, though in writing, may be explained by parol evidence: *Bulwinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645; extended note to *Sullivan v. Lear*, 11 Am. St. Rep. 393. See *McKinney v. Harvie*, 38 Minn. 18; 8 Am. St. Rep. 640.

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## STATE BANK v. FELT.

[99 IOWA, 532.]

**MORTGAGE OF CHATTELS, DESCRIPTION OF PROPERTY.**—A mortgage of animals, stating their species, number and ages, and giving the color of some of them, is fatally defective where it does not show the ownership, possession, or location of any of them. Nor is the description made sufficiently definite by a covenant in the mortgage to preserve and care for the property, not to remove it from a designated county, and to warrant and defend it against the claims of all persons.

**CHATTEL MORTGAGE.—THERE IS NO PRESUMPTION** that a mortgagor is the owner of chattels which he mortgages. Hence, neither his execution of the mortgage nor the placing therein of a covenant against the claims of all other persons amounts to an affirmation, as a matter of description, that the property mortgaged is owned by him.

**NOTICE, WHEN MUST BE ALLEGED AND PROVED.**—If a holder of a chattel mortgage, which is adjudged not to contain a sufficient description of the property mortgaged, wishes to insist that a second mortgagee had notice of the property intended to be included in the first mortgage, he must allege and prove such notice.

Wesley Martin, for the appellant.

A. N. Boeye, for the appellees.

533 GRANGER, J. On the eighteenth day of December, 1888, W. A. East made to the plaintiff bank a mortgage on certain personal property which is the subject of this suit. On the eighteenth day of March, 1889, and again on the eighteenth day



of June, 1889, said East made a mortgage to Mrs. Felt, defendant, and the same property is included in these mortgages together, and Mrs. Felt took possession of the property September 1, 1891. This action is to recover the possession of the property by virtue of the mortgage to plaintiff, which was filed for record on the twentieth day of December, 1888.

The first question we are to consider is as to the sufficiency of the description in plaintiff's mortgage, which the district court held insufficient, and instructed the jury to return a verdict for the defendant. The description is as follows: "Know all men by these presents, that I, W. A. East, of the county of Hamilton and state of Iowa, in consideration of the sum of six hundred and fifty dollars to me in hand paid by the State Bank of Dayton, of Webster county, Iowa, party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his heirs, assigns, etc., the following goods and chattels, to wit: One brown mare, nine years old in spring; one sorrel horse, seven years old in spring; two black two year old colts, white spot in forehead; one mare and one gelding; three red cows, about eight years old; ten cows, about four years old (described as follows, to wit: Three white with red ears, one white with red head, two all white, one red with white face, one <sup>534</sup> red, one spotted, and one roan); three yearling heifers (one white and two red); one red yearling steer; fourteen calves (two steers and twelve heifers); twenty shoats (seven barrows and thirteen sows); and the increase of all the above-described stock—to have and to hold the same forever. And I, the said party of the first part, will forever warrant and defend the same against all persons whomsoever." We have included some more than the mere description because appellant claims that importance is to be attached to the other language. We have no doubt of the correctness of the court's holding. This court has never held such a description good. The rule that a mortgage is sufficient if it will enable third persons, aided by inquiries which the instrument indicates and directs, to identify the property, is well understood, and it is recognized by appellant in argument. Importance is attached to the provisions in the mortgage as to preserving the property from waste, to care properly for the same, or attempting to remove it from Hamilton county, and the covenant to warrant and defend it against the claims of all persons; and it is thought they show ownership by the mortgagor. These, or some of them, are usual covenants under which such mortgages have been construed as

to sufficiency of description. The mortgage is destitute of the means of identificaion, such as ownership, possession, and location, on some of which reliance has usually been placed as indicating sufficiency of description. It does not show who owned the property in terms, in whose possession it was when the mortgage was made, nor where it was kept. *Brock v. Barr*, 70 Iowa, 399, is cited by appellant. In that case it appears that the mortgagor resided in Mahaska county, and that the property was in his possession. The description was held sufficient. It follows *Wells v. Wilcox*, 68 Iowa, <sup>535</sup> 708. In the holdings of this court importance has been attached to a statement as to ownership, location, or possession as a means of identification, or to aid inquiry. Such cases as *Andregg v. Brunskill*, 87 Iowa, 351; 43 Am. St. Rep. 388, and *Rhutasel v. Stephens*, 68 Iowa, 627, control this case on the question of the sufficiency of the description. In *Shellhammer v. Jones*, 87 Iowa, 520, which appellant cites, the mortgage contained much of what is contained in this, on which appellant relies, and, in addition, it stated, in express terms, that the mortgagor owned the property, and importance is attached to that fact in the opinion. The writer would readily concur in a holding that would change the rule of construction in this state, so that the fact of the execution of the mortgage would, in such cases, presumably indicate the mortgagor as owner, and such a rule would often lead to a different conclusion as to the sufficiency of description. Such a rule would nearly, if not quite, bring this case in line with *Shellhammer v. Jones*, 87 Iowa, 520. But that is not the rule.

2. Defendant Felt held mortgages on the property, of sufficient description. It is thought by appellant that some of the divisions of the answer pleaded affirmative defenses, and that it is not alleged in one division that she took her mortgages without notice of plaintiff's mortgage. It is not necessary to consider such points. The answer contains a denial, and an express statement that the description was insufficient to impart notice. The court, when the mortgage was offered in evidence by plaintiff, so held and refused to permit it in evidence. That ended appellant's case. Its right of recovery depended on its mortgage being such as to impart notice. If it relied on actual notice to defendant, it must allege and prove it: *Carson etc. Lumber Co. v. Bunker*, 83 Iowa, 751. <sup>536</sup> Because of the manner in which the cause terminated, by failure of plaintiff to establish prima facie a right to the property, some of the questions argued are of no importance on the appeal.

3. The court directed the jury to return a verdict for the de-

fendant for the amount due on the notes secured by the mortgages, and the unpaid part of the costs of taking and keeping the stock, which the jury found to be one hundred and sixty-seven dollars and ninety-seven cents. The value of the property mortgaged, as averred by plaintiff and admitted by the defendant, was, at least, two hundred and thirty-two dollars. This avoids any question as to whether the value of the property should be what it was when the writ issued, or at the time of the trial. The pleadings fixed the value of the property, for the purposes of the case, to be, at least, two hundred and thirty-two dollars. Defendant claimed it to be fifteen dollars more. The judgment entered is for the amount fixed by the verdict, and it is affirmed.

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**CHattel Mortgages—Sufficiency of Description.** That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property is sufficient: *Davis v. Pitcher*, 97 Iowa, 13; 59 Am. St. Rep. 392, and note. The description in a chattel mortgage referring to the ownership or location of the property mortgaged is of great importance, and the omission of these data may leave imperfect and void a description which were they present might properly be sustained: *Andregg v. Brunskill*, 87 Iowa, 351; 43 Am. St. Rep. 388, and note; *Huse v. Eastabrooks*, 67 Vt. 223; 48 Am. St. Rep. 810, and note.

**NOTICE—WHEN MUST BE PARTICULARLY SET FORTH.**—Where notice is by law necessary, the general averment, whereof the defendant had due and legal notice, is not sufficient; the notice must be particularly set forth: *Rapelye v. Bailey*, 3 Conn. 438; 8 Am. Dec. 199. See extended note to *Lodge v. Simonton*, 23 Am. Dec. 47-53.

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## JENKS v. SHAW.

[99 Iowa, 604.]

**STATUTE OF LIMITATIONS, ABSENCE OF MORTGAGOR FROM THE STATE.**—If one, after executing a mortgage, sells and conveys the land subject thereto and departs from the state, so that the statute of limitations does not run in his favor, the mortgage may be foreclosed as against both him and his resident grantee in possession of the land, though, but for his absence, the statute would have afforded adequate protection to all of them.

**MORTGAGE, UNRECORDED ASSIGNMENT OF.**—The transfer of a note secured by a mortgage is ineffectual as against an innocent third person having no notice of the transfer who deals with the property in good faith in the belief that the mortgagee remains the owner of the mortgage indebtedness. Hence, a purchaser of the property, though before the maturity of the mortgage debt receiving a conveyance both from the mortgagor and the mortgagee, is entitled to hold it as against an assignee whose assignment is not of record, though such purchaser did not make any inquiry respecting the note which the mortgage purported to secure, and, had he done so, must have discovered that it was not in the possession of the mortgagee.



Suit to foreclose a mortgage executed September 12, 1878, by D. L. Shaw to his wife Laura M. She had indorsed the note secured by the mortgage to the plaintiff. Afterward, she and her husband joined in a conveyance of the mortgaged premises to Francis Hartley, who had no notice of the previous transfer of the mortgage indebtedness, and who subsequently conveyed the property to the defendant Anna E. Hartley. The present suit was begun September 2, 1891. The defendant Hartley pleaded the statute of limitations, and all the defendants claimed that the transfer of the mortgage debt had been received by the plaintiff as collateral security for a debt then existing in his favor, but which had been afterward fully paid. Judgment was entered against the defendant Shaw for the amount of the note sued upon, but foreclosure was refused as against the defendant Hartley.

Stillwell & Stewart, for the appellant.

J. H. Trewin, for the appellee.

<sup>607</sup> GIVEN, J. 1. The following statement of the facts, which are undisputed or fairly established by the evidence, will be sufficient for the purpose of the questions to be considered: On September 2, 1878, defendant Shaw executed the note and mortgage, together with another note for the same amount secured by the same mortgage, to his wife, Mrs. Laura M. Shaw, the note in suit to fall due September 2, 1881. Shaw and wife being indebted to one H. P. Lane, in the sum of two thousand two hundred and forty-four dollars, executed to him a mortgage to secure said indebtedness on July 10, 1879, upon certain real estate, including that covered by the mortgage to Mrs. Shaw. At the same time, and as a further security to Mr. Lane, Mrs. Shaw indorsed the note in suit, "without recourse," and delivered the same to Mr. Lane, and also delivered to him the other note, secured by the same mortgage, Lane agreeing that when one thousand dollars was paid on the indebtedness of two thousand two hundred and forty-four dollars to him, he would return said notes and mortgage to Mrs. Shaw. It will be observed that this transaction was prior to the maturity of the note in suit. Some time in the fall of 1879, Lane, for a valuable consideration, transferred the note in suit by delivery to the plaintiff, who received it without knowledge or notice of the agreement by Lane to return the note and mortgage to Mrs. Shaw upon the payment of one thousand dollars. This transfer, it will also be noticed, was before maturity of the note in suit. About the sixteenth day of March, 1881, Francis Hartley pur-

chased the real estate in question from Mr. and Mrs. Shaw for the consideration of nine hundred <sup>608</sup> dollars in cash, paid to Mr. Lane, and received their warranty deed therefor. Mr. Hartley went into immediate possession of the land, and thereafter the title to the same was passed to the defendant Anna E. Hartley, who has ever since been in possession. There is some conflict in the evidence as to whether the one thousand dollars was paid to Mr. Lane upon the mortgage indebtedness to him. Shaw testifies that he had paid him thirteen hundred dollars, but is unable to give dates or amounts. He admits that part of the money paid by Hartley to Lane was used in paying taxes on the mortgaged land. Lane testifies that of the nine hundred dollars received by him from Hartley, but one hundred and sixty-seven dollars was applied on the mortgage indebtedness to him, that the balance was applied in payment of taxes amounting to five hundred and fifty or six hundred dollars, and that the only other credit given upon said mortgage indebtedness to him was fifty dollars. It appears that the other note secured by the mortgage sued upon was surrendered by Lane, but it is not clear when, nor why. We are inclined to think that it was surrendered as a part of the transaction at the time the nine hundred dollars was received from Hartley. On November 26, 1884, judgment was rendered in favor of Lane against Shaw for three thousand three hundred and sixty dollars and forty cents, and this, we think, corroborates Lane in his statement as to the amounts that had been paid to him by Shaw, and leaves it quite clear to our minds that the amount of one thousand dollars had not been paid. Mrs. Shaw never made any assignment of the mortgage sued upon, and the record thereof showed it to be in her name. Neither Mr. nor Mrs. Hartley had any notice at the time they took title of the transfer of the note in suit to the plaintiff, but took title believing <sup>609</sup> that it was free from all encumbrances. The contention on this appeal is solely between the appellant, Mrs. Jenks, and appellee, Mrs. Hartley, and the question presented is, whether appellant is entitled to a decree foreclosing the mortgage in suit as against appellee. Appellee states three reasons why appellant is not entitled to a foreclosure of said mortgage, namely: "As to this defendant the action is barred by the statute of limitations. Defendant and her grantor were innocent purchasers of the land for value from D. L. Shaw and L. M. Shaw, the only persons who, of record, had any interest in it. If Mrs. Jenks was the owner of the note and mortgage, she never placed any evidence of her ownership on record, and, as against the defendant, is estopped from setting up any claim to the property."

2. Defendant, Anna E. Hartley, alleges in her answer "that said notes and mortgage were due September 3, 1881, and that this action was not commenced as to this defendant until January 1, 1892, and that plaintiff's cause of action is barred by the statute of limitations." She now insists that the action was not commenced, as to her, until she was made a party thereto, and that as that was more than ten years after the maturity of the note sued upon, the action is barred as to her. Plaintiff does not dispute the claim that the action was not commenced as to Mrs. Hartley until she was made a party thereto, nor is it questioned that this was after the lapse of more than ten years from the maturity of the note. Plaintiff's contention is, that the mortgage is merely an incident of the debt; that it follows the debt, and continues to exist so long as the debt is enforceable; and that, as this debt is not barred, the plaintiff is entitled to a foreclosure of the mortgage securing it. The action as against D. L. Shaw was commenced within the ten years, and there is no claim that <sup>610</sup> it is barred as to him. Shaw states in his deposition that he has lived in South Dakota for thirteen years, but, the bar of the statute not being pleaded as to him, this statement is immaterial. In *Crow v. Vance*, 4 Iowa, 435, this court held that, by the assignment of the debt, the assignee is entitled to use all the remedies the assignor might have used to enforce the lien of the mortgage against the debtor. In *Hendershott v. Ping*, 24 Iowa, 137, it is said: "While the lien acquired by virtue of the judgment may have ceased at the end of ten years, yet the lien acquired by the mortgage continues until the mortgage debt is paid or discharged." In *Clinton County v. Cox*, 37 Iowa, 571, the court uses the following language: "Under the laws of this state, a mortgage conveys no interest in or title to lands, but is simply a lien thereon for the purpose of securing the indebtedness which is its foundation. It is an incident—a security in the nature of a lien—of the debt. It survives until the debt be paid or discharged, or the mortgage released. It is a conveyance bearing a lien for the protection of the debt, and, as long as that exists, it is not relieved of the duty of protection, or rendered ineffective for that purpose. When the debt is discharged, or by operation of law may no longer be enforced, its functions terminate, and not before. These principles determine the question before us, for, unless it appears that the debt is discharged, or is, under the law, no longer capable of being enforced, the deed of trust stands as security for its payment. The nonresidence of the debtor, Cox, arrested the operation of the statute of limitations, and the remedy upon the indebtedness still ex-



ists. The lien of the deed of trust may be enforced to satisfy the debt. These doctrines are so well supported by the authorities cited, and the conclusion we reach is so plainly deducible therefrom, as to forbid discussion. We have held, applying the <sup>611</sup> same principles, that an admission of a debt and a new promise to pay, which suspends the operation of the statute of limitations, keeps alive the lien of a mortgage given to secure the indebtedness." In *Brown v. Rockhold*, 49 Iowa, 285, it is said: "The general rule is, that the mortgage is but a mere incident to the note which it is given to secure, and that nothing short of payment of the debt, or its extinguishment by operation of law, will discharge the mortgage lien." This doctrine is announced in *Kerndt v. Porterfield*, 56 Iowa, 412. See, also, *First Nat. Bank v. Woodman*, 93 Iowa, 668; 57 Am. St. Rep. 287; *State v. Stuhlmiller*, 94 Iowa, 750. The principle is well established by these and other cases that an action to foreclose the mortgage is not barred so long as the debt which it secures is enforceable. True, in most of the cases the debt was barred upon its face, but was taken out of the operation of the statute by new promise to pay, or by the nonresidence of the debtor, or some other fact that stopped the running of the statute. The principle is alike applicable, whatever may be the facts that rendered the debt enforceable. Appellee's counsel cite and rely upon *Day v. Baldwin*, 34 Iowa, 380, which was an action to foreclose a title bond treated as a mortgage, and for the sale of the premises to satisfy the amount due. The note was barred upon its face, but the maker, Baldwin, who had previously disposed of his interest in the property, was made a defendant, and answered, admitting the indebtedness, and consenting to the sale of the land for the payment of the note, "provided no personal claim be made against him." It was held that, as the petition made no personal claim against Baldwin, but simply against the land, and as Baldwin had no interest in the land, and as his admission of plaintiff's right to recover was made with the proviso that no personal claim be made against him, his admission did <sup>612</sup> not take the action out of the bar of the statute. We see nothing in that case in conflict with those cited, nor with the principle we have announced. Our conclusion is, that under the facts of this case, the plaintiff's right to a decree of foreclosure is not barred by the statute of limitations.

3. We next inquire whether appellant is entitled to a decree of foreclosure. We have seen that appellant is a good faith purchaser of the negotiable note sued upon, for value, before due, and without notice of any infirmities therein. It is a familiar

and undisputed rule of law that the transfer of the note carried with it the security without an assignment of the mortgage; therefore, if nothing further appeared, plaintiff would unquestionably be entitled to a foreclosure. We have also seen that appellee is possessed of whatever title Francis Hartley acquired in the property; that Mr. Hartley purchased the property from Mr. Shaw for value, and received a deed therefor from Shaw and wife, with the usual covenant of warranty of title, in which both joined; also that Mr. Hartley took the title believing that it was clear of encumbrance, and without knowledge that this note had been transferred, was unpaid, and that the mortgage was unsatisfied on the record. It is not disputed but that by this deed Shaw and wife transferred all of their interest in the property to Mr. Hartley, and that they would not be heard to claim any rights under the mortgage; neither is it disputed that by the transfer of the note appellant acquired an interest in the mortgaged property that Shaw and wife could not convey. Appellant contends that, the mortgage being unsatisfied of record, it was notice to Mr. Hartley that should have caused him to inquire whether any of the notes had been transferred, that he was negligent in not so inquiring, and that appellee must suffer the consequence of that negligence. Appellee <sup>613</sup> contends that appellant was negligent in not taking and recording an assignment of the mortgage, and therefore she is not entitled to claim under it as against appellee. Mr. Hartley did not examine the record, and did not inquire as to the notes. He seems to have relied upon the assumption that, as Mrs. Shaw, the mortgagee, joined in the deed and in the covenants of warranty therein, the deed was a satisfaction of the mortgage. Appellant did not take and record an assignment of the mortgage, but seems to have relied upon the rule that the security follows the debt secured. The question in this case is, whether, without notice of record, the security follows the debt as against one purchasing the mortgaged property as Mr. Hartley did; in other words, whether, as to third persons acting without notice, the assignee of a debt secured by mortgage should be required to place evidence of the transfer on the record. This question is fairly answered in *Bank of Indiana v. Anderson*, 14 Iowa, 545; 83 Am. Dec. 390. After stating that the transfer of the note carried with it the security as between the immediate parties to the transaction, it is said: "But a pertinent inquiry is, whether this is equally true as to third persons who had no notice of it, to the extent that they were bound to know that the original mortgagee ceased to have the right to cancel or discharge the

mortgage. The security passes to the assignee or holder of the notes as an incident, and upon the principle that the party holding the debt has a right to that which was given to secure it. But is the theory just or tenable which compels a third person to take notice of such transfer, and of the equitable consequences following? Now, as stated above, the mortgagee or payee may be barred by it. And so there is no hardship or injustice in requiring the mortgagor to take notice of it if he proposes to satisfy his debt, for he has a right, and the exercise of a proper diligence demands, that he <sup>614</sup> should exact the production of the notes before paying the same. But by what process of reasoning can this principle, or this line of argument, be urged against a third party, who, in utter ignorance of the facts, and of facts too, which he could not ascertain by the use of even extraordinary diligence, takes an encumbrance upon property which is apparently freed from the prior lien? We confess our inability to see its applicability or pertinency." It is further said in that opinion: "But, on the other hand, how easy is it for the assignee of the notes or debt thus secured to protect himself. He can, by having the mortgage assigned on the margin of the record, protect himself against all possible fraud on the part of the mortgagee, and leave the evidence of his rights in such a condition as that it must inevitably be seen by any one looking for encumbrances. Or, if not thus, he may take his assignment in the ordinary form, have it duly acknowledged and recorded, and thus give notice of his interest in the security to third persons." In conclusion, it is said: "A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable, as against third persons, to untold abuse. They ought, therefore, to be made a matter of record. The spirit, if not the very letter, of our recording law, requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended with evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances, without a record notice to guide them." This case was followed in *McClure v. Burris*, 16 Iowa, 591. In *Bowling v. Cook*, 39 Iowa, 200, the court, referring to these cases, says: "The doctrine is announced in the case first cited, and is followed in <sup>615</sup> the second, that an assignment of a mortgage, like other instruments affecting real estate, is invalid against subsequent purchasers without notice (and a mortgagee is a purchaser), unless it be recorded. The subsequent mort-



gagee would not be affected by an assignment of a prior mortgage, unless charged with actual notice, or the assignment has been duly recorded. Following this doctrine, we hold that, if the party executing the second mortgage appear from the record to be the one to whom the first was executed, and its assignment is not shown by the record, the equities of the second mortgage are superior to the first." It is further said: "In the absence of the record of an assignment of the mortgage in such a case, the separation of the mortgage interest and the title afterward acquired would not appear so as to defeat the merger, and a purchaser, having no notice of the assignment, would be warranted in presuming that it had happened, and the mortgage interest had been thus extinguished." In *Parmenter v. Oakley*, 69 Iowa, 389, the court, after referring to *Bowling v. Cook*, 39 Iowa, 200, and *Reel v. Wilson*, 64 Iowa, 13, says as follows: "The doctrine of these decisions is applicable to the case at bar. The mortgage, in the absence of any transfer shown by the record, is presumed to be owned and controlled by the mortgagee, and all men may deal with the mortgage or the land, resting upon this presumption, in the absence of actual knowledge of the assignment of the mortgage. The policy of our registry laws is, that the records shall disclose the true condition of lands as to title and encumbrances. These laws are for the protection of all concerned in lands, and they should and do apply to transfers of mortgages as well as to the mortgages themselves. It is no greater hardship to require the assignee of a mortgage to record the assignment than to require the mortgagee to record his mortgage. The <sup>61c</sup> record in both cases is equally demanded for the protection of persons having dealings with the land. *Vandercook v. Baker*, 48 Iowa, 199, and other cases cited by plaintiff's counsel, are not in conflict with the views we have expressed": See, also, *Van Gorder v. Hanna*, 72 Iowa, 573. In *Livermore v. Maxwell*, 87 Iowa, 706, it is said: "If the assignment of the notes did not operate as an equitable assignment of the trust deed, the plaintiff would have no rights under it; but, having the equitable assignment, he must, under our recording acts, place his assignment on record to bind subsequent purchasers and mortgagees who act without notice. The plaintiff, by his failure to have his assignment recorded, induced the defendant to make the loan it did, and put it into the power of J. M. Dunn to obtain and embezzle the money; and, under the rule quoted above, he must bear the consequences." In *Quincy v. Ginsbach*, 92 Iowa, 144, the rule of the foregoing case is followed. Appellant's counsel quote from *First Nat. Bank v.*

Woodman, 93 Iowa, 668, 57 Am. St. Rep. 287, as follows: "The law makes provision for the satisfaction of the record of mortgages when the debts they secure are paid, and the practice is so common, that where one is not canceled, it naturally gives rise to the thought that it is not paid, even though the period of limitation has run." The question in that case was, whether the debt was barred, and the language quoted is not applicable to a case where the mortgagee joins in the conveyance that operates as a cancellation of the mortgage as to the mortgagee. It appears to us entirely clear, under the authorities cited, that the rule in this state is, that the assignee of a debt secured by mortgage must give notice on the record of the transfer to be entitled to preference over subsequent <sup>617</sup> purchasers or mortgagees, without notice of the transfer. So viewing the law, it follows that the decree of the district court must be affirmed.

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**MORTGAGE—ASSIGNMENT OF—NONRECORD OF—RIGHTS OF BONA FIDE PURCHASERS.**—An assignment of a mortgage, though unrecorded, is good against all persons except subsequent purchasers for value without notice: *Nashua Trust Co. v. Edwards Mfg. Co.*, 99 Iowa, ante, p. 226, and note.

**LIMITATIONS OF ACTIONS—EXCEPTIONS AND DISABILITIES—ABSENCE FROM STATE.**—Absence of a party from the state stops the running of the statute of limitations as to causes of action against him: *Stone v. Hammell*, 83 Cal. 547; 17 Am. St. Rep. 272. This is true, though he was so absent when the cause of action accrued: *Stanley v. Stanley*, 47 Ohio St. 225; 21 Am. St. Rep. 806, and note. See *Wilson v. Daggett*, 88 Tex. 375; 53 Am. St. Rep. 766, and note; but his absence must be such as will suspend the bringing of an action against him while absent: *Omaha etc. Land etc. Co. v. Parker*, 33 Neb. 775; 29 Am. St. Rep. 506, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MASSACHUSETTS.**

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**McBRIDE v. POTTER-LOVELL COMPANY.**

[169 MASSACHUSETTS, 7.]

**CONTRIBUTION.—THE LIABILITY** to contribute does not depend on a contract between the parties who are held liable to contribution, nor is it any defense that the transactions out of which it grew happened at different times.

**CONTRIBUTION BETWEEN PLEDGEEES WHOSE PROPERTY WAS WRONGFULLY PLEDGED BY THEIR PLEDGOR.**—Where notes belonging to different persons are placed in the hands of a broker for sale, and he wrongfully pledges them to an innocent pledgee as security for his own debt, who collects some of such notes and pays such debt, the persons whose notes are thus collected may maintain a suit against all the persons whose notes were thus pledged to compel them to contribute ratably to the loss sustained.

**AGENCY, LIABILITY OF SEVERAL PRINCIPALS TO CONTRIBUTE TO LOSS SUSTAINED THROUGH THE FRAUD OF THEIR AGENT.**—If various persons have a common agent, though not by joint selection or appointment, and he uses his power to place all of them under a common liability, as where he pledges their property to secure his own debt, he thereby makes all of them surety for himself, and each is entitled to contribution from all the others for any resulting loss.

Suit commenced in September, 1890, against a large number of defendants for contribution for losses sustained by the plaintiff. The plaintiff and the defendants, other than the Potter-Lovell Company, were makers of promissory notes which they placed in the hands of that company for sale under its agreement to make such sale and remit them the proceeds, after deducting its commission. Instead of selling the notes, it pledged them as security for its own indebtedness, and the notes of the plaintiff were sold by the pledgee under the circumstances stated in the opinion of the court. The case was by the trial judge reserved for the consideration of the full court.



E. W. Hutchins & B. L. M. Tower, for the plaintiffs.

S. H. Tyng, J. C. Coombs, C. R. Elder, and C. K. Cobb, for the defendants.

<sup>s</sup> ALLEN, J. The Potter-Lovell Company, a corporation, held certain notes of the plaintiffs for sale, and it was to remit to them the proceeds, less its commissions for selling the same. The Potter-Lovell Company also held notes of others of the defendants, which it had received from them for sale. Instead of selling the above-mentioned notes for the benefit of the several makers, the company at different times wrongfully and fraudulently pledged all of them to the Second National Bank as security for its own debts to said bank, all the notes being pledged for the same debts. The bank, being a bona fide holder for value without notice, collected enough of these notes from time to time as they fell due, including the notes of the plaintiffs and some others, to satisfy its claims against the Potter-Lovell Company. All of the various parties whose notes were thus fraudulently pledged stood on the same footing, except that the notes were pledged at different times, and fell due and were collected at different times; and except that one of the parties, the North Star Boot and Shoe Company, demanded the <sup>d</sup> return of its note from the Potter-Lovell Company before the same was pledged, and has never paid the same in whole or in part to the bank.

These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part, or not at all. The notes were all pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last: See American Loan etc. Co. v. Northwestern etc. Loan Co., 166 Mass. 337. The various parties selected a common agent, and this agent used its power to place them all under a common liability, thus virtually making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared pro rata. Under such circumstances, equality is equity, without respect

to the time of the maturity of the notes. The demand by the North Star Boot and Shoe Company for the return of its note was also immaterial. It was no more fraudulent to pledge this note after such demand than it would have been to pledge it before a demand. All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged: *Gould v. Central Trust Co.*, 6 Abb. N. C. 381; *New England Trust Co. v. New York etc. Packing Co.*, 166 Mass. 42, and cases there cited; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, 153; 29 Am. Dec. 576; *Warner v. Morrison*, 3 Allen, 566; 1 Story's Equity Jurisprudence, sec. 493.

The assignees in insolvency of the Potter-Lovell Company have no interest in the case. They have no claim arising upon any of these notes, and no duty in respect to the settlement of the questions involved in this suit.

Decree for the plaintiffs.

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**CONTRIBUTION.**—The doctrine of contribution is not so much founded on contract as on the principle of equity and justice that, where the interest is common, the burden also should be common; and this principle, that equality of right requires equality of burden, has a more effectual operation in a court of equity than in a court of law: *Campbell v. Mesler*, 4 Johns. Ch. 335; 8 Am. Dec. 570; *Vandiver v. Pollak*, 107 Ala. 547; 54 Am. St. Rep. 118, and note; note to *Thompson v. Murray*, 29 Am. Dec. 72. Contribution may be enforced by one cosurety against another where one has satisfied the liability of the principal for which both were liable: *Peebles v. Gay*, 115 N. C. 38; 44 Am. St. Rep. 429, and note; it may be enforced between joint tort feors: *Johnson v. Torpy*, 35 Neb. 604; 37 Am. St. Rep. 447, and note; between cotenants, one of whom has paid the taxes against the common property: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; guarantors, some of whom have satisfied the debt which they guaranteed: *Hooper v. Hooper*, 81 Md. 155; 48 Am. St. Rep. 496; legatees holding specific legacies, where the legacy of one is appropriated to satisfy the lawful claims of testator's widow: *Tomlinson v. Bury*, 145 Mass. 346; 1 Am. St. Rep. 464.

**MERRILL v. COLONIAL MUTUAL FIRE INSURANCE CO.**

[169 MASSACHUSETTS, 10.]

**INSURANCE, TRANSFER OF POLICY AS COLLATERAL SECURITY.**—A policy of insurance against loss by fire may be transferred as collateral security, and, in the absence of any stipulation in the policy or any regulation of the insurer by which the assured or his assignee may be bound, the assignee may collect any sum which may become payable by the insurer by process in the assignee's own name if the insurer has assented to the assignment; otherwise, in the name of the assured. The assignment, if it leaves the assignor still interested in the contract and in the loss, does not make the insurance void, because the assignee had no insurable interest in the property.

**INSURANCE—TRANSFER OF AS COLLATERAL.**—The legal effect of a transfer of a policy of insurance against loss by fire is the same as a direction to pay to another in the case of loss, and, in the absence of any prohibition in the policy or by-laws, either method may be properly taken to produce the result.

**INSURANCE, ASSIGNMENT OF, PAROL EVIDENCE TO PROVE THAT IT WAS RECEIVED AS COLLATERAL SECURITY.**—An assignment of a policy of insurance against loss by fire may be proved by parol evidence to have been given and accepted as collateral security for a debt due from the assignor to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer.

**INSURANCE—ASSIGNMENT AS COLLATERAL.**—The consent of the insurer that a policy of insurance may be assigned to a designated person does not require that such assignment be absolute. An assignment absolute in form, but intended as collateral security for a debt due from the assignor to the assignee, is valid, and does not avoid the policy, where such an assignment is not prohibited therein nor by the by-laws of the insurance corporation, and no misrepresentation of facts was made to the insurer, its assent being given without inquiry on its part.

J. W. Corcoran and W. B. Sullivan, for the petitioner.

W. O. Underwood, receiver, per se.

<sup>10</sup> BARKER, J. This petition, brought to establish a claim disallowed by the receiver, was reserved for the full court upon an agreed statement of facts, from which it appears that the claim <sup>11</sup> is for a fire loss, of which due proof was made by the assured in behalf of the petitioner, and that the amount to be recovered, if he can recover either in his own name or in that of the assured, has been adjusted by himself and the receiver, without prejudice, in the sum of eleven hundred dollars.

As the proceedings are in equity, and the questions are raised upon an agreed statement of facts, the claim will be established in favor of the petitioner, who has the beneficial interest in it, if the defendant is liable to anyone for the loss.

The policy was issued, October 1, 1895, to Frederick Barlow, the owner of the property insured. The policy contained a con-



dition that it should be void if assigned without the consent in writing or in print of the company. On November 12, 1895, Barlow filled out and signed a blank printed on the back of the policy, which was then delivered to the company for its consent, and whose secretary then filled out and signed another blank, also printed on the back of the policy, and returned it. These indorsements were of the following tenor:

"The Colonial Mutual Fire Insurance Company hereby consent that the interest of Frederick Barlow in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to Peter H. Corr.

"Nov. 12, 1895.

ISAAC B. WHEELLOCK,

"Secretary."

"For value received, I hereby transfer, assign, and set over unto Peter H. Corr and his assigns all my title and interest in this policy, and all advantages to be derived therefrom.

"Witness my hand and seal this twelfth day of November, 1895. FREDERICK BARLOW. [L. S.]"

"Sealed and delivered in the presence of

James McNaught."

Corr never had any interest, absolute or by way of lien, in the insured property. Barlow was his debtor to an amount much more than the amount of the sum written in the policy. As between Barlow and Corr, it was intended by the instrument signed by Barlow to assign to Corr the right to receive whatever might become due to Barlow by reason of any loss suffered by him under the terms of the policy while the same was in force, and this as collateral security for whatever might be due to Corr from Barlow, and it was not intended to substitute Corr for Barlow as the assured. The secretary of the company <sup>12</sup> assented to the assignment in the ordinary course of business upon its being handed to him by a broker, filled out, and with the request to him to assent on behalf of the company. The form filled by Barlow was the usual and customary form of assignment, printed upon all of the policies of the company, and it is the form which is commonly and usually used by the company for the purpose of transferring absolutely the rights of the original assured in the policy to the assignee, and constituting the assignee, after the assent of the company, the assured. Neither the secretary nor the company had knowledge of the relation between Corr and Barlow, or that Corr had no title in the property, or that he was a creditor of Barlow, or of Barlow's intention to assign the policy merely as collateral security. The company assented to

the assignment believing it to be an absolute assignment of the policy, and believing that thereafter Corr became a member of the company, and all notices since issued by it have been sent to Corr and not to Barlow. The broker who presented the assignment to the secretary with the request for the company's consent was not its own agent. He knew the relation between Corr and Barlow, the ownership of the property, and that the assignment was intended only as collateral security, and did not communicate the facts to the company. The fire occurred on November 14, 1895, and the property was then owned by Barlow, and not by Corr. A proof of the loss was duly made by Barlow for the benefit of Corr. There is no by-law of the company relating to the assignment of a policy for collateral security, and among the by-laws stated there is none relating to assignments of any kind or for any purpose. The company is mutual, with the power of assessing its members in accordance with the statutes.

The receiver does not contend that the policy became void under the condition that it should be so if assigned without consent of the company. There was such consent, however obtained, and it has never been withdrawn or disavowed by the company or the receiver, and it is reaffirmed in the contention which the receiver now makes, that by virtue of the assignment Corr, and not Barlow, is the assured. Only by the assent of the company could there be a novation which would substitute Corr for Barlow as the assured.

<sup>13</sup> The receiver's contentions are, that the assignment constituted an absolute transfer of the policy to Corr, whereby he became the assured, and that he cannot recover, because, while he is the assured, he has not suffered any loss, nor has he put in any proof of loss as the assured, as is required by the policy, and that he cannot recover in the name of Barlow, because, although Barlow suffered the loss and made due proof, he was not after the assignment insured under the policy.

So far as the proof of loss is concerned, it would be enough to say that the agreed statement is that the proof of loss was duly made by Barlow for the benefit of Corr, and that if Barlow was the assured it was for him to make it, and if Corr was the assured, the company having accepted and acted upon it as made for his benefit, without objecting at the time that it was not made by him personally, it was sufficient.

But, in the opinion of a majority of the court, all the contentions of the receiver are unsound, because, though absolute in form, the assignment did not constitute an absolute transfer of the policy to Corr, but an assignment as collateral merely, to

secure his debt by enabling him to receive whatever might become due to Barlow in case of a loss under the policy. Every conveyance may be shown by parol to be not an absolute transfer, but intended merely as collateral security, and here the facts are agreed. In this respect, aside from some stipulation in the policy or some by-law or regulation of the company, a conveyance of a policy of insurance is governed only by the rules which govern other conveyances. Policies of insurance against fire, like other choses in action, may be transferred either absolutely or as collateral security; and, in the absence of any stipulation in the policy or any regulation of the insurer by which the assured or his assignee may be bound, if the original assured remains such, and does not terminate his own contract with the company, his assignee may collect any sum which may become payable by the insurer by process in the assignee's own name if the insurer has assented to the assignment, and otherwise in the name of the assured; and the assignment, if it leaves the assignor still interested in the contract and in the loss, does not make the insurance void because the assignee has no insurable interest in the property: See *Fogg v. Middlesex etc. Ins. Co.*, 10 Cush. 337; <sup>14</sup> *Phillips v. Merrimack etc. Ins. Co.*, 10 Cush. 350; *Hale v. Mechanics' etc. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410.

Of course, if the assured parts with his whole interest in the contract by an absolute assignment of it to another, so that thereafter the indemnity which the policy promises cannot inure to his benefit, he cannot recover for a loss, and if in such a case his assignee has no insurable interest in the property, the insurance would be void. But the assignment in the present case being in fact not absolute but merely as collateral security, Barlow did not part with his interest in the policy, or sever his relation to the company, but remained the real owner of the company's promise of indemnity in case of loss by fire. He was still the assured, the loss was his loss, and the whole indemnity inures to his benefit, though payable to another to apply upon his debt. The legal effect of such a transfer is the same as a direction to pay to another in case of loss, and, in the absence of any prohibition in the policy or by-laws, either method may be properly taken to produce the result. If Barlow remained the assured, he was to make the proof of loss, and the fact that Corr had no insurable interest in the property is no defense.

Nor can we assent to the contention that whether Corr became the assured must be determined from the instrument of transfer itself, and not from the uncommunicated intention of



Corr and Barlow, nor from acts done by them without the knowledge of the company, so that the present assignment must be held an absolute one, and the intention of Corr and Barlow immaterial.

The indemnity which the company promised was hampered by no restriction that it should not be made payable to any other person, nor that the assured should not deal with his contract in any way sanctioned by the law, save only the condition that the policy should be void if assigned without the company's consent. The condition deals with assignments generally. Nothing requires that they shall be of one character, and not of another, and the only restriction imposed upon any assignment is that it shall be consented to. Aside from this the assured could deal in any legal way with his contract and the advantages to be derived from it.

Nor can it be contended that the consent of the company <sup>15</sup> was given under such circumstances as to be void or inoperative in favor of the petitioner, as in *Lynde v. Newark Fire Ins. Co.*, 139 Mass. 57. Here there was no provision that the policy was not assignable for purposes of collateral security. The company has provided only one way of making an assignment, whether it is by way of collateral or to accompany a transfer of the property insured, and it has not given, either expressly or by implication, any notice that it was to be informed of the purpose or nature of such assignments as might be brought for its consent. No misrepresentation of the facts was made to it. It made no inquiry when its consent was asked. The form which it had provided and which was used was applicable to all circumstances, and there is nothing to show that any other form was provided or expected to be used in case the assignment was intended merely as collateral security. Under this state of things the assent is good for the assignment according to the intention of the assignor and assignee, so far as that intention is within the legal meaning of the words used by them when explained by competent oral evidence.

The company assented without inquiry, and under circumstances which did not require any disclosure, to an assignment of any kind that was valid and not inconsistent with the words used. If it assumed, as it did, that the property had passed from Barlow to Corr, the assignment did not so state, and the fact that the same form was the one commonly used for transferring policies absolutely, and constituting the assignee the assured, did not, under the circumstances, avoid the consent or

estop the petitioner from relying upon it: See *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 28, 29; 52 Am. Rep. 245; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 78; *Firemen's Ins. Co. v. Barnsch*, 161 Ill. 629; *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417; 53 Am. Rep. 202; *Stevens v. Queen's Ins. Co.*, 32 N. B. 387; *McPhillips v. London Ins. Co.*, 16 Can. L. T. 213; *Blackburn v. St. Paul etc. Ins. Co.*, 116 N. C. 821.

The claim is to be established in favor of the petitioner for the sum of eleven hundred dollars, the amount agreed upon between the receiver and the petitioner.

So ordered.

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**INSURANCE POLICY—ASSIGNMENT AS COLLATERAL SECURITY TO ONE HAVING NO INSURABLE INTEREST.**—A policy of life insurance issued to a creditor of the assured may be assigned by such creditor as collateral security, and the assignee may enforce payment of the policy, although, at the time of the assignment, he had no insurable interest in the life of the assured, and notwithstanding the policy expressly provides that any claim made by an assignee shall be subject to proof of interest. An assignment as collateral security does not come within the meaning of such provision: *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245; 25 Am. St. Rep. 114, and note. See extended notes to *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906-908, on assignment of life insurance policy to one having no insurable interest in the life insured: *Bursinger v. Bank of Watertown*, 58 Am. Rep. 854-858. An insurance policy may be the subject of a pledge, and such a policy delivered as security for a note is a good pledge, giving the pledge an equitable lien upon the proceeds: Note to *Palmer v. Merrill*, 52 Am. Dec. 786. See monographic note to *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 747-755.

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## **BURNEY v. CHILDREN'S HOSPITAL.**

[169 MASSACHUSETTS, 57.]

**BURIAL RIGHTS.—BEFORE THE BODY OF A DECEASED HUMAN BEING IS BURIED**, there is a right vested in the husband or wife or next of kin to possession, for the purpose of burial or other legal disposition of it.

**A FATHER UPON THE BODY OF WHOSE DECEASED MINOR CHILD** an autopsy has been performed without his consent may maintain an action.

Tort for causing an autopsy to be made of the dead body of the plaintiff's minor child without his consent. A demurrer to the complaint having been sustained, the plaintiff appealed.

R. W. Gloag, for the plaintiff.

H. Wheeler, for the defendant.

**57** LATHROP, J. The demurrer in this case is a general one, and the question presented is, whether the father of a child, who is its natural guardian, and who has intrusted the child to a hospital for treatment, may maintain an action against the hospital for an autopsy performed on the dead body of his child without his consent.

The sole contention of the learned counsel for the defendant in support of the demurrer is, that the action cannot be maintained, **58** because there is no right of property in a dead body: 2 Blackstone's Commentaries, 429; 3 Inst. 202.

Even in England, before a dead body is buried, while there is no right of property in it, there is a right of possession for the purposes of burial, or other lawful disposition of it. Thus in *Queen v. Fox*, 2 Q. B. 246, where a prisoner in jail on execution died, and the jailer refused to deliver the body to the executors of the deceased unless they would satisfy certain claims made against him, the court of queen's bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. So in *Williams v. Williams*, L. R. 20 Ch. Div. 659, while it was held that there is no property in a dead body, it was also held that the executors had a right to the possession of the body, and that it was their duty to bury it.

In this commonwealth, the precise question before us has not been passed upon. It is, however, apparent from the decisions that a right of possession is recognized, which is vested in the husband or wife, or next of kin, and not in the executors.

In *Lakin v. Ames*, 10 Cush. 198, the defendants were sued in trespass for tearing down a horse shed. The defense was that the shed was on the public common of the town, and was erected in front of a tomb lawfully on the burying ground adjoining the common, so as to obstruct the entrance thereto, and that the first-named defendant, having the legal right to open the tomb, and deposit the body of his deceased brother therein, peaceably removed the shed, doing no unnecessary damage. Liberty given by the town to a man to build a tomb was held to be a grant to the man and his heirs. The first-named defendant had no legal interest in the tomb, nor had he express authority from his mother, one of the heirs of the former owner. But it was said by the court: "The law will imply a license from the nature and exigencies of the case, the relation of the parties, and the well-established usages of a civilized and christian community."

In *Durell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 284, it was held that a husband, who had buried his wife in a public bury-



ing ground, was not liable as a trespasser for removing a grave-stone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. It was said by Mr. Justice <sup>59</sup> Bigelow: "The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowledge or consent. The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long established usage of the community."

In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, it was held that, if the plaintiff owns the lot in which the body of his child is buried, he may maintain an action of tort in the nature of trespass quare clausum fregit for the unlawful removal of the body; and, in measuring damages, the jury may take into consideration the injury to the plaintiff's feelings, if it appears that the defendant acted in willful disregard or careless ignorance of the plaintiff's rights.

In *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, the right of a husband to bury his wife was again recognized, and it was held that, if he had not freely consented to the burial of her body in a lot of land owned by another person, with the intention or understanding that it should be her final resting place, a court of equity would permit him, after such burial, to remove her body, coffin, and tombstones to his own land.

In *Driscoll v. Nichols*, 5 Gray, 488, cited by the defendant, the plaintiff was a stranger in blood to the deceased. The action was in contract or tort for not carrying the dead body. The case was decided on the ground that the plaintiff had no legal interest in the dead body, by reason of which he could maintain the action against the carrier without proof of a special contract with himself. That case differs widely from the one at bar.

In Rhode Island, it is held that there is a quasi right of property in a dead body which the law will protect. Thus, in *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 237, 14 Am. Rep. 667, it is said by Mr. Justice Potter: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one toward the dead; a <sup>60</sup> duty, and we may also say a right, to pro-

tect from violation; and a duty on the part of others to abstain from violation; it may, therefore, be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case."

So in *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, it was held that there was a quasi right of property in a dead body, and that, as a general rule, a widow had the primary right to control the burial of her husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise.

In the case at bar, there was no executor, and there could be none, as the deceased was a minor. The father, as the natural guardian of the child, was entitled to the possession of its body for burial.

Being entitled to the possession of the body for the purposes of burial, is not his right against one who unlawfully interferes with it, and mutilates it, as great as it would be if the body was buried in his lot, and was thence unlawfully removed? That an action may be maintained in the latter case we have already seen; and we are of opinion that it may be in the former.

This is so held in a well-considered case in Minnesota, where, in an action brought by a widow for the unlawful dissection of the body of her dead husband, an order overruling a demurrer to the complaint was affirmed: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370. This was followed in a similar case in New York: *Foley v. Phelps*, 1 App. Div. 551, where the right to possession was defined thus: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative": See, also, *Renihan v. Wright*, 25 Ind. 536; 21 Am. St. Rep. 249; *Young v. College of Physicians etc.*, 81 Md. 358; 19 Am. Law Rev. 251; 10 Alb. L. J. 71; 4 Am. L. T. 127; 3 Chic. Leg. News, 378; *Perley on Mortuary Law*, 26 et seq.

The question has not been argued by the defendant whether the nature of the hospital is such that an action against it cannot <sup>61</sup> be maintained for the alleged illegal acts of its officers and servants, and we express no opinion upon it. Nor do we need to inquire under what circumstances an autopsy is justifiable, as this question also has not been argued. These questions can better be determined when the facts are before us after a trial

of the case. All that we need now to decide is, whether the objection raised by the defendant is valid or not. As we are of opinion that it is not valid, the order sustaining the demurrer and directing a judgment for the defendant must be set aside.

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**BURIAL RIGHTS—RIGHTS IN BODY OF DECEASED RELATIVE BEFORE BURIAL.**—By the old English law, the body was not recognized as property, but the charge of it belonged exclusively to the state and the ecclesiastical courts, as did also the administration of estates; but it is held to be quasi property over which the relatives of the deceased have rights which our courts of equity will protect: Monographic note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 513, 514; *Hackett v. Hackett*, 18 R. I. 155; 49 Am. St. Rep. 762, and note. Any interference with such rights is an actionable wrong. So damages are recoverable from one who mutilates or destroys a human body: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370, and note. See, also, *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135; 56 Am. St. Rep. 26, and note.

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## MENDELL *v.* DUNBAR.

[169 MASSACHUSETTS, 74.]

**WILLS—EXECUTION AND ATTESTATION OF.**—If a testator, being ill and unable to leave his bed, signs his will in the presence of subscribing witnesses, who thereupon withdraw to another room, no part of which is visible from any part of the room in which he is, and there subscribe it as witnesses, and then return to the testator and inform him that they have signed his will, and show him their signatures, and he assents thereto, such will is not executed as required by a statute demanding that it be signed by the testator, and attested and subscribed in his presence by three or more competent witnesses.

J. C. Lane, for the appellants.

E. Lowe, for the appellees.

**74 LATHROP, J.** By the Public Statutes, chapter 127, section 1, to entitle a person to dispose of his estate by will, it must be signed by him or by some other person in his presence and by his express direction, "and attested and subscribed in his presence by three or more competent witnesses."

**75** The questions presented by the report are two: 1. Was the instrument signed by the witnesses in the presence of the testator? 2. If not, was the subsequent action of one of the witnesses in the presence of the others, and the assent of the testator, a sufficient compliance with the statute? We are of opinion that both questions must be answered in the negative.

In *Boldry v. Parris*, 2 Cush. 433, it appeared that two of the witnesses to a will signed it when in another room from the tes-



tatrix, connected by an intermediate room with the one in which she was, and not in her view or hearing; and it was held that this was not in her presence, and so not a compliance with the statute.

In *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464, the instrument was signed by the attesting witnesses at a table in an adjoining room, at a distance of nine feet from the testator. The door was open between the rooms, and the table was within his line of vision, if he had been able to look, but on account of an injury he could not turn his head to look. He could hear all that was said, and knew and understood all that was done. It was said by Chief Justice Morton: "The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe 'in his presence'; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence."

In the case at bar, the only fact which appears bearing upon the first question is, that after the testator signed in the presence of the subscribing witnesses, they "thereupon withdrew to another room in the house, no part of which was visible from any part of the room where the testator remained, and there subscribed as witnesses." It does not appear where they went, or whether the doors between the rooms were open or shut, or whether what was done was within hearing. The burden of proof was upon the proponents of the instrument offered for probate to satisfy the court that this instrument was signed by <sup>76</sup> the witnesses in the presence of the testator. On the facts found it does not appear that this was in his presence.

The second question we must regard as settled by the case of *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 687. The opinion of Mr. Justice Gray contains a full and careful consideration of the authorities; and we see no occasion to reconsider the question.

The ruling of the single justice was therefore right; and the decree of the probate court is to be affirmed, and the cause remitted to that court for further proceedings.

So ordered.

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**WILLS—ATTESTING IN PRESENCE OF TESTATOR—WHAT IS.**—A will is not attested in the presence of the testator, however close he may be to the witnesses at the time, if his position is such

that he cannot possibly see them sign, or where his position is such that he cannot readily change it, and the witnesses are out of his sight. The true test is not whether the testator saw the witnesses sign, but whether, considering his mental condition and his posture at the time he might have seen them do so: *Witt v. Gardiner*, 158 Ill. 176; 49 Am. St. Rep. 150, and note; *Pawtucket v. Ballou*, 15 R. I. 58; 2 Am. St. Rep. 868, and note. Attestation of a will by witnesses in an adjoining room is not a compliance with statute requiring it to be done in the presence of the testator, even though he might have seen them writing their names by sitting on the side of his bed: *Reynolds v. Reynolds*, 1 Spear, 253; 40 Am. Dec. 599, and note.

## PEOPLE'S NATIONAL BANK v. FREEMAN'S NATIONAL BANK.

[169 MASSACHUSETTS, 129.]

**BANKERS—DRAFT AND SEALED PACKAGE, WHAT IS A DELIVERY OF CONTRARY TO INSTRUCTIONS.**—If a draft and a sealed package are sent to a bank, accompanied by the instruction, "papers to be delivered only upon payment of the draft," no information being given as to the contents of the package, and the bank allows the drawee to open the package and examine its contents, it is not guilty of any breach of the instructions, and therefore is not liable to the sender, though the package contains a report upon reading which the drawee found to be adverse to his interest, and he consequently refused to make payment of the accompanying draft.

M. F. Dickinson, Jr., and H. R. Bailey, for the plaintiff.

H. M. Rogers, for the defendant.

**130 BARKER, J.** The defendant received by mail from the plaintiff for collection a sight draft pinned to a sealed package addressed to the drawee of the draft, who was a broker. The draft and package were sent in a letter, the contents of which, so far as material, were that the draft was for collection without protest, and "Papers to be delivered only upon payment of draft." The defendant had no knowledge of the contents of the sealed package, save such as could be inferred from the letter and from the appearance of the package, which was a large blue linen lined envelope, bearing the drawee's name and address in manuscript, and no more.

The drawee came to the defendant's bankinghouse in response to a notice, and, at his request, the cashier there handed to him the sealed package with the draft attached, and allowed him to open the package and examine its contents, after which the drawee handed back to the cashier the draft and package, and declined to pay the draft.

The package contained a report upon certain mines, which report the drawer of the draft, a mining expert, had made to the drawee, who wished to use the report in selling the mines, and who had employed the drawer to examine the mines, and to make a report thereon for a compensation, of which a part had been paid in advance, and the rest, payable on the delivery of the report, was represented by the draft. The report was long, and concluded with a summary to the effect that the mines were worthless.

Upon the refusal of the drawee to pay the draft, the defendant returned the draft and package to the plaintiff, with a letter stating that the draft was unpaid, and adding, "Denham claims the contract has not been fulfilled." Denham was the drawee. The plaintiff declined to receive the draft and package, returned them to the defendant, and brought this suit.

One count alleges the conversion by the defendant to its own use of the mining report. The other count alleges that the plaintiff employed the defendant to collect the draft and to <sup>131</sup> keep and handle the sealed package and to deliver it to the drawee only on payment of the draft, and that the defendant negligently and in violation of its instructions delivered the sealed package without payment of the draft, by reason of which the drawee became acquainted with the contents of the mining report; that the defendant destroyed the money value of the draft and of the report, and that but for such negligence the defendant could have collected the draft in full.

The case was tried without a jury, with a finding that the defendant had violated the instructions under which the draft and package were sent to it by the plaintiff, and that the plaintiff was entitled to recover damages in the sum of one dollar, and no more. At the request of the parties the case was reported for our determination upon all the points of law involved, with the agreement that if, upon the case presented and the findings made, the plaintiff is entitled to recover, and, in any aspect of the case, is not limited to nominal damages, judgment shall be entered for the plaintiff in the sum of one thousand dollars, without interest and costs, and that, if the plaintiff is not entitled to recover, judgment shall be for the defendant without costs; and with the further agreement that, if the evidence of usage, and of the conversation between the cashier and the drawee when the draft and package were handed to the drawee and handed back by him to the cashier, which evidence was excluded against the defendant's objection, should have been admitted, that it is to have the effect to which, if believed, it would be entitled; and



also that, if the defendant's objections to the admission of evidence tending to prove that the transactions between the drawer and drawee out of which the draft and mining report arose were sound, this court is to give effect to such objections, and to render judgment accordingly. The evidence of usage was that there is a well-known and well-established usage among the collecting national banks in Boston to allow parties to whom are addressed packages to which drafts are attached, with instructions identical with those in the present instance, to inspect the contents of such packages before the acceptance or payment of the drafts drawn on them.

The conversation excluded was, in substance, that when the draft and envelope were first shown by the cashier to the <sup>132</sup> drawee, the latter said that he was entitled to receive certain papers from the drawer, and was ready to pay the draft on receiving them; that when the drawee handed the package back, he said that the envelope did not contain the papers promised him, and was not according to contract; that he declined to pay the draft; and further, that he would examine some papers at his own office, and asked to have the draft presented again the following day, when it was in fact again presented and payment again refused. The evidence admitted against the defendant's objection was admitted on the question of damages, and consisted of certain portions of the drawer's deposition tending to prove the contract between himself and the drawee, its performance on his own part, and his own instructions to the plaintiff when he placed with the plaintiff the draft and package.

Although the draft and package were not at once returned to the plaintiff when the draft was not paid upon its first presentation, but were held one day by the defendant, and the draft was then again presented to the drawee in accordance with his request, while the letter of instructions contained the statement, "These collections are not to be held for any reason whatever—return at once if not paid on presentation"—this breach of instructions does not appear to have been relied upon at the trial, and is not alluded to in the briefs, and we treat it as immaterial upon the questions raised by the report.

Nor do we consider the question of usage, or the other question of evidence. Assuming that the drawer had performed his contract, and was entitled to receive from the drawee the amount of the draft upon the delivery to the drawee of the mining report, when the drawee came to the banking-house in response to notice of the draft, the cashier committed no breach

of the plaintiff's instruction, "Papers to be delivered only upon payment of draft," by handing the draft and the sealed package to the drawee, and permitting him to examine the contents of the package. With or without the excluded conversation, there was no delivery of papers within the meaning of the prohibition in the instruction quoted. The acts of the cashier and of the drawee, interpreted alone or in connection with what was said by them at the time, could not in law be found to be a delivery <sup>133</sup> of the papers, either of the draft or of the mining report. The delivery meant by the plaintiff's instruction was a surrender of the package to the drawee as his own property; and the instruction was not violated by allowing the drawee to take the draft and the sealed package into his own hands in the banking-house for the purpose of examining the contents of the package, and so determining whether he would accept the package and pay the draft. That purpose is the only one which can reasonably be found, and it negatives delivery in the sense which that word has in the plaintiff's letter of instructions.

The word "delivery" could have no double meaning in the letter of instructions, and the delivery which the defendant was prohibited from making, except upon payment of the draft, could be no other than the delivery which it was required to make upon such payment. That was clearly an absolute delivery to the drawee as his own, and thus the prohibition was not against allowing the drawee to take the draft or package into his own hands, not as his own property, but for the purpose of examination to see whether he would accept the package and pay the draft. Such a temporary and qualified possession is not a delivery: See *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Mills v. Gore*, 20 Pick. 28; *Markey v. Mutual Benefit etc. Ins. Co.*, 103 Mass. 78; *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554; *Springfield v. Harris*, 107 Mass. 532, 538, 540; *Shurtleff v. Francis*, 118 Mass. 154; *Stevens v. Stevens*, 150 Mass. 557; *McCreary v. Boston etc. R. R. Co.*, 153 Mass. 300, 307; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465.

It was not prohibited by the letter of instructions, as it might have been if the drawee was not to examine the papers. And the defendant had no reason to suppose that it was contrary to the wish of the plaintiff or of the drawer of the draft, or that it could in any way prejudice the rights of any party to the transaction. Upon the report there should be judgment for the defendant, without costs.

So ordered.

**BANKS AND BANKING—BANK AS COLLECTING AGENT—DUTIES OF.**—The most frequent employment of bankers as agents is in the matter of collecting choses in action deposited with them for that purpose. The general rule as to the duty of the bank is, that it is "bound to all reasonable diligence to protect the interests" of the holder of the property: Monographic note to *Isham v. Post*, 53 Am. St. Rep. 775. Of course, where there is a special contract between the bank and the holder, or where there are special instructions given by the holder, such contract or instructions furnish the measure of the bank's duty: Monographic note to *Allen v. Merchant's Bank*, 34 Am. Dec. 309, on the liability of bank as agent for collection. In the absence of any agreement to the contrary, a bank which receives a check from a customer is liable to him for any negligence whereby the collection of the check is defeated: *Bailie v. Augusta Sav. Bank*, 95 Ga. 277; 51 Am. St. Rep. 74, and note.

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## NORTHAMPTON NATIONAL BANK v. SMITH.

[169 MASSACHUSETTS, 281.]

**RESCISSION.**—One wishing to rescind a contract and to recover what has been paid under it must first restore whatever of value he has received.

**BANKING, CHECK PAID BY MISTAKE, RECOVERY UPON.**—If a check is paid by mistake, the payer must return, or offer to return, it to the payee before the former can maintain an action to recover the amount so paid.

C. N. Clark, for the plaintiff.

A. E. Addis, for the defendant.

**282 ALLEN, J.** This action is brought to recover money paid by mistake by the plaintiff to the defendant, upon a check which the plaintiff had been instructed by the drawer not to pay. The statement of facts is imperfect, but it is said in the plaintiff's brief that the check was drawn upon the plaintiff by one Herbert in favor of the defendant, and given by him to the defendant. There is no suggestion that it was so given as a gratuity or merely for the defendant's accommodation, and we assume that it was not so given. Payment had once been demanded and refused, but on a second presentation of the check several weeks later it was paid through inadvertence. The plaintiff demanded a return of the money without tendering the check to the defendant, and there was no such tender until the day of the trial. The only question which has been presented to us is whether it **283** was necessary to tender the check before bringing the action; and we think it was.

It has often been held that, when one wishes to rescind a contract and recover what he has paid under it, he must first restore whatever of value he has received: *Snow v. Alley*, 144 Mass. 546,



551; 59 Am. Rep. 119; *Bartlett v. Drake*, 100 Mass. 174, 176; 97 Am. Dec. 92; 1 Am. Rep. 101. The reasons for this rule are fully applicable to the present case. The check, if unpaid, belonged to the defendant, and would be useful and valuable to him to be used in connection with his own testimony in establishing a claim against Hebert. It has been held that anything absolutely worthless, like a counterfeit bill, need not be returned: *Brewster v. Burnett*, 125 Mass. 68; 28 Am. Rep. 203; *Kent v. Bornstein*, 12 Allen, 342; *Snow v. Alley*, 144 Mass. 546, 551; 59 Am. Rep. 119; *Reed v. Boston etc. Co.*, 141 Mass. 454. But the check in the present case was not of that character. If, upon its presentation, payment had been refused, the plaintiff would have had no right to retain possession of it, and such retention against the defendant's will would have been a conversion. And if, after a payment had been made through inadvertence or mistake, the plaintiff sought to enforce a return of the money, it was its duty first to tender the check to the defendant. It would be of use to him, and he was entitled to have it before returning the money. The case of *Evans v. Gale*, 21 N. H. 240, is much in point; and the doctrine of this decision was affirmed in *Cook v. Gilman*, 34 N. H. 556. The same doctrine is implied in *Coolidge v. Brigham*, 1 Met. 547, 550; *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 285, 100 Am. Dec. 120, *Estabrook v. Swett*, 116 Mass. 303, and *Bassett v. Brown*, 105 Mass. 551, 558. See, also, *Otisfield v. Mayberry*, 63 Me. 197; *Park v. McDaniels*, 37 Vt. 594.

Upon the agreed statement of facts, the entry must be judgment for the defendant.

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**CONTRACTS—RESCISSION—DUTY OF PARTY RESCINDING.** A party electing to rescind a contract must restore what he has received under it, or pay its value as a prerequisite condition: *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555, and note; *Jennings v. Gage*, 13 Ill. 610; 56 Am. Dec. 476, and note. See monographic note to *Johnson v. Evans*, 50 Am. Dec. 674.

**BANKS AND BANKING—PAYMENT OF CHECK BY MISTAKE—ACTION FOR MONEY THUS PAID.**—As a general rule, an action for money had and received lies to recover money paid by mistake or upon a consideration which has failed: *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610, and note. Money paid to the holder of a check or draft drawn without funds may be recovered back if paid by the drawee under a mistake of fact: *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; 100 Am. Dec. 120, and note. See note to *Mayor v. Lefferman*, 45 Am. Dec. 171; note to *Buffalo v. O'Malley*, 50 Am. Rep. 139-141; note to *Gould v. Emerson*, 39 Am. St. Rep. 504.

## WILLARD v. MASONIC EQUITABLE ACCIDENT ASSOCIATION.

[169 MASSACHUSETTS, 288.]

**INSURANCE, ACCIDENT, VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.**—One who, seeing a track actually occupied by a train in readiness to be moved, undertakes to cross between the cars, because he thinks he has time to do so, but without any inquiry, is guilty of voluntary exposure to unnecessary danger, and if injured cannot recover, though insured against accident, if the policy declares that the insurance does not cover accidents resulting wholly or partly from voluntary exposure to unnecessary danger.

Action upon a certificate of membership in the defendant corporation, whereby it promised to pay the plaintiff a stated sum weekly to indemnify him from loss resulting from bodily injury caused by external, violent, and accidental means. The policy, however, provided that it did not cover an accident resulting, wholly or partly, directly, or indirectly, from voluntary exposure to unnecessary danger. The plaintiff was going to the place of his employment, and, in doing so, took a short route consisting of a path generally traveled by the public and crossing the tracks of the Fitchburg railway. He saw a freight train standing on this track, and, after looking up and down, he saw the engineer of the train leaning out of the window and three or four men, whom he supposed to be brakemen, standing near by, and he thought they were waiting for orders or for another train, and that he would have ample time to cross the track. After waiting for about a minute he stepped in front of the car and in between cars. Just at that time the train backed up, and his foot was caught between the drawbars. The trial judge directed a verdict on the ground that the injuries were suffered by the plaintiff in consequence of his voluntary exposure to unnecessary danger.

D. Malone, for the plaintiff.

D. T. Montague, for the defendant.

**290 ALLEN, J.** There was no implied invitation by the railroad company for the plaintiff or other persons to cross the railroad track at that time and place. The track was actually occupied by a freight train, which was in readiness to be moved. An attempt to cross the track between the cars under such circumstances involves a direct peril, in case the train happens to be moved during the time occupied in getting across. The plaintiff knew that the train was liable to be started soon, he saw the engineer and brakeman in their places upon it in readiness for

their work, but he thought they were waiting for orders to go on, or for another train, and that he had time enough to get across. Without any inquiry, he made the attempt simply on his own idea that he would have time enough. This was certainly a risky thing to do, and it was unnecessary, because he might easily have gone round. It was a voluntary exposure to unnecessary danger, within the meaning of the policy. The case is distinguishable from *Keene v. New England etc. Assn.*, 161 Mass. 149, and is more like *Tuttle v. Travellers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316, though even stronger against the plaintiff than that case was. See, also, *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453; *Follis v. United States etc. Assn.*, 94 Iowa, 435; 58 Am. St. Rep. 408.

Exceptions overruled.

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**INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.**—Within the meaning of an accident insurance policy exempting the insurer from liability to the insured caused by his voluntarily exposing himself to unnecessary danger, it is such exposure, as a matter of law, for the insured to attempt, on a dark night to cross a railroad trestle on the ties and on that side of the trestle having no rail, when the opposite side of the trestle is provided with a rail and plank walk and is open for use: *Follis v. United States etc. Assn.*, 94 Iowa, 435; 58 Am. St. Rep. 408, and note. See, also, *Collins v. Bankers' etc. Ins. Co.*, 96 Iowa, 216; 59 Am. St. Rep. 367, and note.

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## STUDLEY v. BALLARD.

[169 MASSACHUSETTS, 295.]

**PUBLIC OFFICERS, CONTRACT TO PAY FOR SERVICES RENDERED AND EXPENDITURES MADE BY.**—A contract to pay an officer for services outside the line of his duties and for which the law allows him no fee is enforceable. Hence, a deputy sheriff who, at the request of another, went to a place to get evidence upon which to found a complaint and advice as to the best manner of serving a warrant may recover for his services and his necessary expenditures in doing so.

Action by the plaintiffs, who were deputy sheriffs, to recover for services and disbursements. The defendant asked the trial judge to rule that the action could not be maintained because the promise of the defendant relied upon by the plaintiff was without consideration and the alleged contract was illegal and void. The judge refused this ruling, and, on the contrary, ordered judgment for the plaintiffs.

J. L. Rice, for the defendant.

W. W. Leach, for the plaintiffs.



**295** HOLMES, J. The place of seizure was the town of Hampden. The plaintiffs lived in Palmer. There were other deputies nearer, but the defendant especially desired and requested the plaintiffs to do the work, and promised to pay them. The case is here, after a finding for the plaintiffs by a judge without a jury, upon an exception to a refusal to rule that the contracts were without consideration and illegal. That broad question is the only one before us. It appears that the plaintiffs, at the defendant's request, went to Springfield to get evidence upon which to found complaints, and advice as to the best manner in which to proceed in serving the warrants, and subsequently made complaints, obtained warrants, and served them. We must assume that the judge found that the defendant's promises referred to the preliminary **296** or outside work and expenditures, and that the trips to Springfield recovered for fall within the promises as thus construed. No question is raised by the exceptions on these points.

It follows that the exceptions must be overruled. The rule of law is simple. A contract to pay an officer for doing his official duty, or to pay him a sum in addition to his statutory fees, cannot be enforced: *Pool v. Boston*, 5 Cush. 219; *Brophy v. Marble*, 118 Mass. 548; *Hatch v. Mann*, 15 Wend. 44. But a contract is good to pay him for services outside the line of his duty for which the law allows him no fee: *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315; *Trundle v. Riley*, 17 B. Mon. 396; *England v. Davidson*, 11 Ad. & E. 856. In *Shattuck v. Woods*, 1 Pick. 171, 175, it is said that, if an officer returns an execution unsatisfied by consent of the creditor and has incurred any expense, he must look to the creditor for his recompense.

We cannot say that the plaintiffs have been allowed to recover for anything except their time, travel, and outlay in order to get information before filing the complaints. In *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315, a deputy sheriff who went in pursuit of escaped prisoners and recaptured them was held entitled to a reward which had been offered. In these cases, as in that, the plaintiffs were under no "specific official obligation" to look up information, and, apart from the defendant's promises, would have been entitled to no pay for their trouble or expense. It does not appear that what they did fell within chapter 100, section 43, of the Public Statutes, and it is unnecessary to consider what the effect of that section would be.

Exceptions overruled.

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**CONTRACTS OF PUBLIC OFFICERS — VALIDITY OF.**—The question of the validity of a contract of a public officer depends not upon the circumstance whether it can be shown that the public

has in fact suffered any detriment, but whether the contract is such in its nature as might have been injurious to the public interest: *Spence v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69. Thus, a prisoner's contract to pay his jailer for extraordinary services and attention in his sickness, and which the law does not make it his duty to perform, is binding and not against public policy: Monographic note to *Parsons v. Trask*, 66 Am. Dec. 511; while a contract to pay an officer a greater compensation for services required by law than that fixed by statute is absolutely void: Monographic note to *Parsons v. Trask*, 66 Am. Dec. 514. See extended note to *State v. Collier*, 37 Am. Rep. 422, 423.

## SWIFT RIVER COMPANY v. FITCHBURG RAILROAD COMPANY.

[169 MASSACHUSETTS, 326.]

**DAMAGES, MEASURE OF FOR DELAY IN SHIPPING MACHINERY.**—Though through the negligence of a carrier to whom steel boilers were delivered for transportation they were delayed ten days, it is not answerable for damages resulting from the loss of the plaintiff lying idle for want of such boilers, nor for expenditures for labor made in daily expectation that the boilers would arrive, where the carrier was not informed of the purpose for which the boilers had been ordered, nor of the loss likely to result from delay in their delivery. The carrier is, however, liable for expenditures made in telegraphing, and looking for the boilers, and for a team for hauling the expected boilers.

Tort to recover for defendant's failure to deliver with reasonable dispatch two steel boilers and fittings and castings shipped to the plaintiff over the defendant's railroad. The goods were shipped on August 3d, and should have arrived at their destination two days later. By mistake on the part of the defendant, they were sent to a town of the same name in New Hampshire, and were not received by plaintiff until August 13th. The only question before the court was as to the measure of damages. The trial judge excluded evidence offered by the plaintiff for the purpose of showing that the boilers and attachments were not such as were kept in stock and had no market value, and were especially ordered by the plaintiff to replace old boilers in his factory; that anticipating their arrival at Enfield on the 5th of August, he made preparations to receive and place the boilers, and that these preparations included the entire stopping of the plant of the plaintiff. In daily expectation that the boilers would arrive, the plaintiff expended three hundred and fifty-five dollars and twenty-five cents, all of which was for labor and for a temporary roof and removing the same, except fifteen dollars for "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers," and the use of these boilers during the time of the delay would have been worth three hundred

and fifty dollars to the plaintiff. The judge ruled that, assuming the facts offered to be proved, the plaintiff, as a matter of law, was entitled to nominal damages only.

W. G. Bassett, for the plaintiff.

G. A. Torrey, for the defendant.

<sup>327</sup> MORTON, J. There are two counts in the declaration, one for negligently failing to carry with reasonable dispatch, and the other in trover, and both being for the same cause of action. The goods were shipped on August 3d, and should have been at Enfield on August 5th. They were sent by mistake on the defendant's part to Enfield, New Hampshire, and, in consequence, were not received by the plaintiff till August 13th. The defendant admits that the delay was caused by its negligence, and the only question is one of damages.

We doubt whether, under the circumstances, trover will lie: *Robinson v. Austin*, 2 Gray, 564. But under whichever count the damages are assessed, the measure must be the same. The <sup>328</sup> defendant is liable for such damages as are the natural and proximate results of its conduct, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as the probable result of a breach of it: *Harvey v. Connecticut etc. R. R. Co.*, 124 Mass. 421; 26 Am. Rep. 673; *Derry v. Flitner*, 118 Mass. 131, 134; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen, 381; *Goddard v. Barnard*, 16 Gray, 205; *Hadley v. Baxendale*, 9 Ex. 341. There was no evidence, we think, which fairly tended to show that the defendant had notice of the circumstances attending the ordering of the boilers, or of the nature of the plaintiff's business and the use to which the boilers were to be put, or of the fact that the plaintiff's mill was stopped or to be stopped for the purpose of making a change in boilers. Such notice could not be inferred fairly, we think, from the character of the property, or from the fact that the old boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped. The damages which the plaintiff claims, with a single exception to be noticed hereafter, could not have been therefore within the contemplation of the parties when the goods were received for transportation. Neither do we think that they were the proximate result of the delay on the defendant's part: *Waite v. Gilbert*, 10 Cush. 177; *Ingledeu v. Northern R. R. Co.*, 7 Gray, 86; *Brock v. Gale*, 14 Fla. 523; 14 Am. Rep. 356; *Johnson v. Mathews*, 5 Kan. 118; *Cooper v.*



Young, 22 Ga. 269; 68 Am. Dec. 502; *Gee v. Lancashire etc. Ry Co.*, 6 Hurl. & N. 211.

The plaintiff's mill might have been stopped from any one of numerous causes. If the market value of the property had depreciated in consequence of the delay, or the property had suffered damage through exposure to the weather, such loss would have been the proximate result of the delay, and the defendant would have been liable for it. But assuming that the boilers were of a special kind, and were not bought and sold in the market, we think, as already observed, that except in one respect the damages which the plaintiff claims were not the direct or proximate result of the delay. Amongst the cash items expended by the plaintiff is one for "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers, \$15." We think that <sup>329</sup> this should have been allowed: *Waite v. Gilbert*, 10 Cush. 177. Very likely this was not called especially to the attention of the court. But, as the ruling was that the plaintiff was entitled to only nominal damages, the exceptions must be sustained, and it is so ordered.

Exceptions sustained.

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**CARRIERS—DELAY IN DELIVERING MACHINERY SHIPPED—DAMAGES.**—If one engaged in equipping a cotton factory, and having men employed under pay, ships machinery for his factory on a railroad, and the company is negligent in failing to deliver the freight within a reasonable time, whereby the men are forced to remain idle, the measure of damages for the delay is interest on the unemployed capital, the wages paid to the men, and other damages resulting from the delay and strictly traceable to it: *Rocky Mt. Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693; 56 Am. St. Rep. 682; and note. See extended note to *McKinnon v. McEwan*, 42 Am. Rep. 464; *Cooper v. Young*, 22 Ga. 269; 68 Am. Dec. 502; *Foard v. Atlantic etc. R. R. Co.*, 8 Jones, 235; 78 Am. Dec. 277, and note.

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## DOWDELL, PETITIONER.

[169 MASSACHUSETTS, 387.]

**INSANE PERSONS, PROCEEDINGS FOR COMMITMENT OF.**—A statute providing for the commitment of a person to an insane asylum, though without any notice to him, is not in conflict with the declaration of rights nor with the fourteenth amendment to the constitution of the United States, if it makes provision for his subsequent discharge by two trustees of the asylum, or upon judicial proceedings before a justice of the supreme court, upon the written application of any person, if it appears that the person so in custody is not insane nor dangerous to himself or others, and that he ought not to be longer confined.

J. J. McCarthy, for the petitioner.

F. T. Hammond, assistant attorney general, for the commonwealth.

<sup>387</sup> ALLEN, J. The only ground for the petitioner's discharge which is set forth in the petition, or relied on in argument, is that the provisions of statute under which he was committed are unconstitutional, as being in violation of article 12 of the declaration of rights, and of the fourteenth amendment to the constitution of the United States. The former provides that no subject shall be deprived of his liberty but by the judgment of his peers, or the law of the land. The latter, that no state shall deprive any person of liberty without due process of law.

So far as the declaration of rights is concerned, it has been twice determined that a person who is in fact insane is not entitled to be discharged from a hospital on habeas corpus, provided the court is satisfied that the restraint and treatment there will be beneficial to him: *In re Oakes* (1845), 8 L. R. 122; *Denny v. Tyler*, 3 Allen, 225. In both of these cases, the person was committed without any previous hearing, and without the order of any judge. It was held that the provision of the declaration of rights is not of universal application, <sup>388</sup> and that it does not entitle an insane person to be set at liberty, if restraint is proper under the circumstances of the particular case.

In the present case, it must be assumed from the petition, report, and argument, that the petitioner is in fact insane, and that the restraint and treatment of the hospital are beneficial to him. The case therefore falls directly within the decisions cited.

As a matter of construction, the same considerations would apply to the fourteenth amendment of the constitution of the United States. If, however, the language of that amendment should be deemed applicable to cases of insane persons who are held under a wholesome and beneficial restraint at the instance of their relatives or friends, then it would be necessary to determine whether the petitioner is deprived of his liberty without due process of law. He was committed to the hospital, under the provisions of chapter 87, section 12, of the Public Statutes, as amended by chapter 195 of the Statutes of 1894, and section 13, as amended by chapter 493 of the Statutes of 1894, and chapters 286 and 429 of the Statutes of 1895, upon the application of his daughter, by the special justice of the police court of Chelsea. It is not denied that the commitment was in accordance with the provisions of the statutes, which apply alike

to all the inhabitants of this commonwealth. These statutes do not in terms require any notice to the person alleged to be insane, before the order of commitment is signed; and probably no such notice is required by construction, in view of the long usage to the contrary in this commonwealth. But ample provision is made by later sections of the same chapter for his discharge afterward by any two of the trustees of the hospital, or, upon judicial proceedings, by a justice of the supreme judicial court, upon the written application of any person, if it appears that the person so confined is not insane, or that he is not dangerous to himself or others, and ought not longer to be so confined: Pub. Stats., c. 87, secs. 40-44.

The order of commitment settles nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him: *Leggate v. Clark*, 111 Mass. 308, 310. He is entitled as a matter of right to institute judicial proceedings under the statutes, to determine the necessity and propriety of his confinement. He is not denied the same ~~389~~ protection of the laws which is enjoyed by all other persons in the commonwealth under like circumstances. He is not, therefore, deprived of liberty without due process of law, according to the judicial construction which has been put upon those words: *Marchant v. Pennsylvania R. R. Co.*, 153 U. S. 380; *Hallinger v. Davis*, 146 U. S. 314, 321; *Caldwell v. Texas*, 137 U. S. 692; *Dent v. West Virginia*, 129 U. S. 114; *Missouri v. Lewis*, 101 U. S. 22. It has been declared repeatedly that the phrase "due process of law" does not of itself require a trial by jury in states where the usage and statutes are otherwise: *Montana Co. v. St. Louis etc. Co.*, 152 U. S. 160, 171; *Hurtado v. People*, 110 U. S. 516; *Walker v. Sauvinet*, 92 U. S. 90. The legislature, as *parens patriae*, may to some extent make provision for the care of those who are unable to take proper care of themselves, as in the case of insane persons and neglected children: *Sohier v. Massachusetts General Hospital*, 3 Cush. 483, 497; *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452; *Church of Jesus Christ v. United States*, 136 U. S. 1, 57, 58. And the right to institute judicial proceedings under the statutes is a sufficient protection of the liberty of the subject to meet constitutional requirements: *Wares, Petitioner*, 161 Mass. 70, 74; *Miller v. Horton*, 152 Mass. 540, 543; 23 Am. St. Rep. 850; *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452; *Jones v. Robbins*, 8 Gray, 329, 341; *Chavannes v. Priestley*, 80 Iowa, 316; *Doyle, Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759.



So far as the present case is affected, the fourteenth amendment adds nothing to what was required by article 12 of the declaration of rights.

The order dismissing the petition was right.

Petition dismissed.

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**INSANE PERSONS—COMMITMENT OF—DUE PROCESS OF LAW.**—A valid proceeding to commit one as insane requires notice, and an opportunity to be heard before judgment. There must be a trial before a determination as to his sanity, and an opportunity to produce witnesses and evidence. Hence, a statute authorizing such a commitment, but not so framed as to compel a hearing before judgment, and which does not guarantee to the person charged an opportunity to be heard in defense, is invalid because it conflicts with those provisions of the state and federal constitutions which forbid that any person shall be deprived of his life, liberty, or property, without due process of law: *State v. Billings*, 55 Minn. 467; 43 Am. St. Rep. 525, and monographic note on due process of law as applied to insane persons. See *Doyle, Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759, and note.

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## BUMSTEAD *v.* COOK.

[169 MASSACHUSETTS, 410.]

### EASEMENT, WHEN DOES NOT PASS BY IMPLICATION.

An easement not expressly described in a conveyance must actually belong to the estate conveyed in order to pass by implication.

A CONVEYANCE WITH COVENANTS OF WARRANTY OF REAL ESTATE SURREPTITIOUSLY AND ILLEGALLY CONNECTED WITH A PUBLIC SEWER through a drain existing on the land of another private proprietor does not pass the right to the use of such sewer as appurtenant to the land conveyed, nor render the warrantor answerable for damages sustained by the fact that the grantee acquired no right to the continuance of the drain and sewer as they existed at the time of the conveyance.

W. G. Bassett, for the plaintiff.

T. G. Spaulding, for the defendant.

<sup>411</sup> KNOWLTON, J. The plaintiff's claim is founded solely on the contract expressed in writing in the defendant's deed. Previously to the erection of the house standing on the lot conveyed by the defendant to the plaintiff, one Maynard, owning a lot adjoining the one described in the deed, and acting under an oral license from the defendant, constructed a drain from a house which he built on his lot, through the land described in the deed to a brook, and thus conducted the sewage from his house across the defendant's lot. Afterward the city laid a public sewer through the street in front of the premises, and Maynard took

the end of his drain out of the brook and entered it into the sewer, and paid the city the regular fee for entrance for a single house, in accordance with the regulations of the sewer commissioners. Subsequently the defendant erected a double tenement house on the land described in his deed to the plaintiff, and, without permission from the city or from Maynard, entered the drain from this house into Maynard's drain on his own land, and in that way drained his house into the public sewer. He was using the public sewer in this way surreptitiously, or at least without right, at the time of making the deed to the plaintiff, who was afterward compelled to pay to the city a fee of fifty dollars for entering the sewer, which she seeks to recover in this action.

The deed describes the land by metes and bounds, and makes no reference to any right in other land, or to the subject of drainage in any way. The public sewer was outside of the land conveyed, and it is obvious that no right to use it passed as parcel of the real estate described.

The plaintiff contends that a right to use the sewer was appurtenant to the land conveyed, and therefore passed by implication. We need not consider whether such a right was so far necessary to the use and enjoyment of the property conveyed that an easement would have been created by implication as against the grantor if he had been the owner of the public sewer and the land through which it runs, for there is another <sup>412</sup> answer to this part of the plaintiff's case. The defendant was not the owner of the sewer, nor of the land through which it runs, and he had no right in it which he could convey. In *Philbrick v. Ewing*, 97 Mass. 133, Mr. Justice Hoar says that "an easement, where it is not expressly described in the conveyance, must actually belong to the estate conveyed in order to pass by implication." This was the precise point adjudicated. To the same effect are *Swazey v. Brooks*, 34 Vt. 451, and *Spaulding v. Abbott*, 55 N. H. 423. No case to the contrary has been brought to our attention. See, also, in recognition and further application of the doctrine, *Wells v. Day*, 124 Mass. 38, 43, and *Johnson v. Knapp*, 146 Mass. 70, 75. We think it clear that the deed did not convey by implication, nor purport to convey, any right to drain the premises through the public sewer beyond the limits of the plaintiff's land without payment for the privilege.

The only remaining question is whether the city, by virtue of chapter 354 of the Statutes of 1888, and its action under it, had a lien upon the granted premises at the time of the conveyance

which constituted an encumbrance upon the property. This statute, by sections 5 and 7, provides two ways in which the city may be reimbursed in whole or in part for the expense of constructing a sewer; one is by assessment of the cost upon the estates of persons benefited; the other is by prescribing a sum to be paid as a condition of allowing a particular drain to be connected with the sewer. Assessments made under section 5 constitute a lien upon the estates for two years from the time of the assessment, but the statute gives no lien for a fee to be paid under section 7 as one of the terms and conditions of entering a sewer with a particular drain. The agreed facts show that the cost of construction of this sewer was paid with money appropriated by the city for that purpose, and that no assessment has ever been made upon any person benefited. On the other hand, the regulations of the sewer commissioners, acted upon by the city, prescribed, as one of the terms and conditions of entering a sewer with a particular drain, the payment of a fee. We do not intimate that, in the absence of a special provision therefor, the sewer commissioners could, by prescribing terms and conditions to that effect, create a valid lien upon an estate for the payment <sup>413</sup> of such a fee. If they could do this, their rules and regulations show that they have not attempted to do it, and that there is no lien for payment under the existing law and under their rules and regulations.

It is obvious that the city proceeded in the construction and management of the sewer with a view to obtaining partial reimbursement from fees for entering the sewer, and not from assessments. It would now be impracticable, if not impossible, to lay assessments upon the estates benefited, and the agreed facts indicate that the city has had no intention of trying to do it. If the plaintiff relied upon the existence of a lien, the burden was upon her to show it. The defendant was unlawfully using the sewer at the time of making his deed, and the agreed facts fail to show that there were any relations between him and the city that subjected his estate to a lien. The plaintiff was mistaken in supposing that the defendant was the owner of a valuable right affecting the property outside of that described in the deed, about which nothing was said orally, and no stipulation was made in writing. There was no error in the decision of the superior court.

Judgment affirmed.

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**EASEMENT—WHEN PASSES BY IMPLICATION.**—An easement, where it is not expressly described in the conveyance, must actually belong to the estate conveyed in order to pass by implica-



tion, and grants by implication are limited to cases of strict necessity: Monographic note to *Green v. Collins*, 40 Am. Rep. 538, 539. An easement, not expressly mentioned in a deed, does not pass, unless it naturally and necessarily belongs to the premises: *Whiting v. Gaylord*, 66 Conn. 337; 50 Am. St. Rep. 87, and note. See *Carbrey v. Willis*, 7 Allen, 364; 83 Am. Dec. 688, and note; *Butterworth v. Crawford*, 46 N. Y. 349; 7 Am. Rep. 352; also, monographic note to *Elliott v. Rhett*, 57 Am. Dec. 763.

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## BRODERICK v. HIGGINSON.

[169 MASSACHUSETTS, 482.]

**EVIDENCE—HABITS OF ANIMALS.**—It is competent to prove that a dog has the habit of attacking passing teams, in support of a disputed allegation that it did attack a passing team on a particular occasion.

**HUSBAND AND WIFE, ADMISSION OF ONE AS EVIDENCE AGAINST THE OTHER.**—In an action by a husband and wife to recover for personal injuries suffered by them, an admission made by the husband out of the presence of his wife may be admitted in evidence against him, but the jury must be charged that such admission cannot be considered in the case against her.

Two actions of tort, one by a husband and the other by his wife, to recover damages for injuries suffered from a dog belonging to the defendant. The plaintiffs claimed that the dog in question rushed into the highway, frightened their horse, and caused them to be thrown from their carriage. Evidence offered on behalf of the plaintiffs to show that the dog made other attacks upon passing teams was excluded, and the plaintiffs excepted. The defendant offered to prove that after the accident the husband admitted that it happened through the fault of the horse, and that the dog did not make any attack whatever. The wife was not present when the alleged admission was made. This evidence was admitted, and the judge charged the jury that both cases were dependent on one state of facts, that the principles of law applicable to one were equally applicable to the other, and that, as the cases were tried together, the rights of the wife were dependent upon those of the husband, and the husband's upon those of the wife, and that if one could not prevail, the other could not. The trial judge refused to rule that any admissions of the husband not made in the presence of the wife could not affect her rights to maintain her action, and that his evidence and admissions are to be treated the same as the evidence and admissions of any witness in the case so far as his rights are concerned, and the plaintiffs excepted. The jury returned a verdict in favor of the defendant in each case.

B. W. Potter, for the plaintiffs.

W. S. B. Hopkins, F. B. Smith, and W. S. B. Hopkins, Jr., for the defendant.

<sup>484</sup> KNOWLTON, J. A question common to both of these cases is, whether it is competent to prove that a dog has a habit of attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion.

It is a familiar fact that animals are more likely to act in a certain way at a particular time, if the action is in accordance with their established habit or usual conduct, than if it is not. There is a probability that an animal will act as he is accustomed to act under like circumstances. For this reason, when disputes have arisen in regard to the conduct of an animal, evidence of his habits in that particular has often been received: *Todd v. Rowley*, 8 Allen, 51, 58; *Maggi v. Cutts*, 123 Mass. 535, 537; *Lynch v. Moore*, 154 Mass. 335. These cases fully cover the question now presented. They are authorities not only to the proposition that evidence of habit may be received in such cases, but that habits may be proved by evidence of the frequent observation of particular instances. Of similar import, although somewhat different in the application of the principle, are the later cases of *Bemis v. Temple*, 162 Mass. 342, and *Shea v. Glendale Elastic etc. Co.*, 162 Mass. 463. We are of opinion that the evidence should have been admitted.

The other question arises only in the case of the female plaintiff. The liability of the defendant in the two cases depends upon the same facts, and it would seem anomalous that a verdict should be rendered in his favor in one case and against him in the other. But to prove facts relied on by him the admission of the husband was competent in the husband's case, and not in the wife's. If her case was being tried alone, it is clear that her husband's admissions would not be competent. They were not made competent against her by the fact that for convenience <sup>485</sup> his case was being tried at the same time with hers. It was the duty of the presiding judge to instruct the jury that these admissions might be considered in his case, but not in hers. Sometimes the risk that a party who has made no admissions may be prejudiced by the admissions of another party whose rights or liabilities depend on the same facts, is so great that a court will order separate trials, when otherwise their cases would be tried together. When cases of this kind are tried together the jury should be properly instructed, so that the rules of evidence may be applied for and against each party as if but one case was on

trial. The instructions requested upon this part of the case were correct, and the instructions given were erroneous.

Exceptions sustained.

**ANIMALS—EVIDENCE AS TO VICIOUSNESS.**—One may recover for injury by bite of a dog, upon showing the owner's knowledge of his propensity to bite whether in anger or not: *Evans v. McDermott*, 49 N. J. L. 163; 60 Am. Rep. 602, and note. Thus evidence of previous and of subsequent viciousness is competent: *Kennon v. Gilmer*, 5 Mont. 257; 51 Am. Rep. 45; *East Kingston v. Towle*, 48 N. H. 57; 2 Am. Rep. 174. See, also, extended note to *Knowles v. Mulder*, 16 Am. St. Rep. 632.

**EVIDENCE—HUSBAND AND WIFE—ADMISSIONS OF AS EVIDENCE AGAINST EACH OTHER.**—The interest of a husband in an action for personal injuries to the wife is such that admissions made by him relative to the subject matter of the action may be admitted in evidence for the defendant: *Shaddock v. Clifton*, 22 Wis. 114; 94 Am. Dec. 588. As to admissions in other matters, see *May v. Sturdivant*, 75 Iowa, 116; 9 Am. St. Rep. 463; *Fox v. Windes*, 121 Mo. 502; 48 Am. St. Rep. 648; *Swift v. Massachusetts etc. Ins. Co.*, 63 N. Y. 186; 20 Am. Rep. 522. Admissions of the wife are not admissible to charge her husband in an action against them for an assault and battery committed by her: *Hussey v. Elrod*, 2 Ala. 339; 36 Am. Dec. 420. And, in general, wife's declarations in her husband's absence, tending to charge the husband with a liability are not evidence against him: *Rideout v. Knox*, 148 Mass. 368; 12 Am. St. Rep. 560, and note.

## HARRINGTON v. McCARTHY.

[169 MASSACHUSETTS, 492.]

**A MANDATORY INJUNCTION** should issue against the maintenance by the defendant of a building in so far as it projects over the lands of the plaintiff, nor is it any defense to a suit for an injunction that the land of the plaintiff beneath such projection is a driveway, and he therefore has not yet suffered any injury from the projection.

**LACHES WHERE A MANDATORY INJUNCTION IS SOUGHT.**—One who calls attention when the foundation stones of a building are laid to the fact that he believes the wall will project over his land and who brings suit before the building is completed to compel the removal of so much of it as projects over his land, cannot be refused relief on the ground that he has been guilty of laches.

**INJUNCTION, MANDATORY, WHEN MAY BE REFUSED.** If, in laying the foundation wall of a building, a corner stone projects a short distance beyond the builder's line and below the surface of the ground, but such encroachment was unintentional and very slight and compensation was offered therefor, a mandatory injunction will not issue at the request of the owner of the adjacent land to compel the removal of this encroachment, where no appreciable damage has resulted to him, and such removal might be difficult and expensive. The plaintiff will be left to his remedy at law.

G. S. Taft, for the plaintiff.

J. R. Thayer and A. P. Rugg, for the defendant.



<sup>493</sup> KNOWLTON, J. This is a bill in equity to obtain a mandatory injunction against the maintenance by the defendant of a building over and upon the land of the plaintiff. The general principles applicable to cases of this kind have often been stated. The proposition relied on by the plaintiff appears in *Lynch v. Union Inst. etc.*, 159 Mass. 306, 308, in these words: "In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages."

The defendant has constructed a wooden building with a cornice, which, at the front corner of the building, projects over the plaintiff's land a distance of eighteen inches. Some of the window sills project slightly over the plaintiff's land. He was under no mistake in regard to the boundary line, except as to the question whether the line at one end ran to the center or to one side of a monument about four inches wide. When he <sup>494</sup> was putting in the foundation stones the plaintiff called his attention to his duty by telling him that he thought the wall was over the line. The bill was brought and notice of its filing was given to him before the house was completed. In our opinion the case falls within a large number of decisions granting relief by injunction to plaintiffs whose rights have been encroached upon by erections placed upon their land without right: *Tucker v. Howard*, 128 Mass. 361; *Creely v. Bay State etc. Co.*, 103 Mass. 514; *Cadigan v. Brown*, 120 Mass. 493; *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 168; *Lynch v. Union Inst. etc.*, 158 Mass. 394; 159 Mass. 306. The case does not fall within any of the exceptions stated in the case last cited: See, also, *Brande v. Grace*, 154 Mass. 210; *Starkie v. Richmond*, 155 Mass. 188; *Methodist etc. Soc. v. Akers*, 167 Mass. 560.

The fact that the plaintiff's land is now used as a driveway does not affect his rights. He may at any time desire to erect a building upon it. Nor is it material that he has not yet suffered any actual damage in the use of his property: *Melrose v. Cutter*, 159 Mass. 461, 469; *Peck v. Conway*, 119 Mass. 546, 550. The maintenance of the defendant's building over his land would, by the lapse of time, ripen into an easement which might materially affect the value of his property if nothing were done to prevent it.

The case shows no such laches as to deprive the plaintiff of his remedy: *Linzee v. Mixer*, 101 Mass. 512, 528; *Attorney Gen-*

eral v. Algonquin Club, 153 Mass. 447, 453. He called the defendant's attention to his rights before the foundation wall had been completed, and the defendant could hardly have failed to know that his cornice would extend over the plaintiff's land. The building is constructed of wood, and the projecting portions can easily be removed without substantial injury to the rest of the structure. We are of opinion that the plaintiff is entitled to an injunction against the maintenance of any part of the wooden building over his land.

The case shows that, while the foundation wall is in the main upon the defendant's land, an occasional stone projects a short distance into the plaintiff's land below the surface of the ground. It appears that the defendant told the contractor who was building the wall of the plaintiff's statements in regard to it, and <sup>495</sup> directed him to be sure not to go over the line as run by the surveyor, and believed he did not go over it. In view of the fact that the encroachment in this particular was unintentional and very slight, that the defendant, when he discovered it after the building was nearly completed, "offered to pay plaintiff any sum he might claim," and the plaintiff refused to accept anything but removal; and in view of the further fact that the judge found that no appreciable damage resulted to the plaintiff, while it seems that the removal of the projecting portions of these stones might be difficult and expensive, we are of opinion that equity does not require us to order an injunction on this part of the case. As to this, the plaintiff is left to his remedy at law: *Lynch v. Union Inst. etc.*, 159 Mass. 306; *Methodist etc. Soc. v. Akers*, 167 Mass. 560.

So ordered.

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#### INJUNCTION—MANDATORY—WHEN WILL ISSUE—LACHES.

Mandatory injunction will be issued only when a court of law cannot grant adequate relief, or where full compensation in damages cannot be made: *Atchison etc. R. R. Co. v. Long*, 46 Kan. 701; 26 Am. St. Rep. 165, and note. It will issue at the suit of a city to compel a lotowner therein to remove his buildings which encroach upon or obstruct a public street: *Eau Claire v. Matzke*, 86 Wis. 291; 39 Am. St. Rep. 900, and note. See, also, *Pile v. Pedrick*, 167 Pa. St. 296; 46 Am. St. Rep. 677. The most frequent cases in which mandatory injunctions are employed are those of nuisances and trespasses of an irreparable nature: Monographic note to *Murdock's case*, 2 Bl. Ch. 461; 20 Am. Dec. 381, on jurisdiction to grant mandatory injunction. Chancery in granting injunctions in cases where the right is not clear until established at law will refuse the exercise of its power when it appears that the plaintiff has been guilty of laches: *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758, and note; extended note to *Bell v. Hudson*, 2 Am. St. Rep. 802, 803. See *Orne v. Fridenberg*, 143 Pa. St. 487; 24 Am. St. Rep. 567.

## ATTORNEY GENERAL v. DROHAN.

[169 MASSACHUSETTS, 534.]

**QUO WARRANTO.—AN INFORMATION IN THE NAME OF THE ATTORNEY GENERAL** cannot be maintained to try the title to any other than a public office.

A PUBLIC OFFICER IS one whose duties are in their nature public, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested equally as members of the entire body politic, or of some duly established division thereof.

**PUBLIC OFFICE.—MEMBERSHIP IN A POLITICAL COMMITTEE** BELONGING to one party cannot constitute a public office, though the legislature has deemed it expedient to regulate by statute the election and conduct of members of such committee. The title of persons claiming to be elected members of such committee, therefore, cannot be tried on an information filed in the name of the attorney general.

**ELECTION, ACTION OF OFFICERS, WHEN FINAL.**—If a statute provides for an election of members of a committee of a political party and for proceedings by the election commissioners for a recount, and declares that such commissioners have authority to recount the ballots cast and determine the questions raised, and that such recount shall stand as the true result of the vote cast, the declaration of the commissioners of the result of the recount is final and conclusive, and cannot be disregarded by the members of such committee.

J. B. Goodrich and T. J. Kenny, for the plaintiff.

J. A. Dennison, for the defendants.

**535 MORTON, J.** The first question is whether the relators, as members of the democratic city committee of Boston, hold public offices. If they do not, this information cannot be maintained, since the attorney general can intervene in matters of this nature only so far as they relate to public offices. For any interference with their private rights, the remedy of the relators is by proceedings in their own names against the parties in possession of the offices to which they claim to have been elected: *Commonwealth v. Dearborn*, 15 Mass. 125; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *Attorney General v. Sullivan*, 163 Mass. 446, 448; *Attorney General v. Clark*, 167 Mass. 201; *Attorney General v. Adonai Shomo Corp.*, 167 Mass. 424.

Except for the fact that several acts have been passed by the legislature which relate, amongst other things, to political committees, no one would contend, we presume, that the members of a political committee belonging to one of the political parties hold public office by reason of their being members of such committee. We do not think that the effect of these statutes has been or is to make that a public office which was not before



their enactment. Without attempting an exhaustive definition of what constitutes a public office, we think that it is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it: *Brown v. Russell*, 166 Mass. 14; 55 Am. St. Rep. 357; *United States v. Hartwell*, 6 Wall. 385; *People v. Nostrand*, 46 N. Y. 375; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *Opinion of the Justices*, 3 Greenl. 481.

A distinction has been taken between public office and public employment to which it is not necessary now to do more than to refer: *Brown v. Russell*, 166 Mass. 14; 55 Am. St. Rep. 357. Manifestly, membership in a political committee belonging to one party or another does not come within the above description of what constitutes public <sup>536</sup> office. The fact that the legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance.

Neither is it necessary, in order to protect the rights of members of political committees, that the office should be regarded as a public one. As already observed, that may be done by proceedings instituted in their own names by those whose rights have been interfered with, and this court and the superior court are expressly given full powers at law and in equity to enforce the provisions of the statutes relating to political committees and caucuses.

We think, therefore, that the rights of the relators cannot be determined in this form of proceeding. The relators have, however, filed a motion to amend the information by striking out the name of the attorney general and inserting their own names, so that they may be the sole parties plaintiff; and assuming that such an amendment will be allowed, with other amendments, if any, that may be necessary, we proceed to consider the questions which thus will be presented, speaking of the relators henceforward as the plaintiffs.

The defendants and the plaintiffs both claim to have been elected at the same caucus. No question arises concerning the regularity of the proceedings relating to the calling of it, or to its organization. It appears from the agreed facts, that at the

caucus the plaintiffs "were declared elected members of the democratic committee of ward 16, and within three days thereafter were each presented a certificate of election to said democratic committee of ward 16 by the warden and clerk of said caucus." By statute, the members of the several ward committees of a political party in a city constitute a committee called a city committee: Stats. 1895, c. 489, sec. 4. By their election, therefore, as members of the democratic committee of ward 16, the plaintiffs became members of the democratic city committee of Boston. The day following the caucus, ten legal voters of the ward petitioned the election commissioners of Boston, as they <sup>537</sup> had the right to do (Stats. 1896, c. 435, sec. 4; Stats. 1895, c. 507, sec. 23), for a recount, alleging that another ticket had received more votes than that which bore the names of the plaintiffs. Thereupon the commissioners recounted the ballots, "and determined the questions raised in said petition, and reported to the president of the democratic city committee that by their recount of said ballots no material change appeared from the count as declared by the said warden and clerk of said caucus." At this recount, parties representing the respective tickets on which were the names of the plaintiffs and defendants were present, as it is provided by statute that they could be, and "addressed the commission on the subject matter of the aforesaid petition." Shortly afterward, at a meeting of the democratic city committee, duly called and assembled, the plaintiffs appeared and participated in the temporary organization of the committee, and the defendants then objected to the admission of the plaintiffs as members of the committee for the reasons set forth in a communication filed with the secretary of the committee. Thereupon the committee voted to give each side an opportunity to present its case, and at the conclusion of the hearing, against the protest of the plaintiffs, seated the defendants as members of the committee. Pursuant to and following this action of the committee, its secretaries filed with the secretary of the commonwealth, and with the board of election commissioners of the city of Boston, and with the secretary of the state committee of the political party of which they were a portion, a list of the members of the democratic city committee of Boston for the year beginning June 1, 1897, which included the names of the defendants, instead of including, as the plaintiffs contend it should have, their names. No objection existed to the eligibility of the plaintiffs up to the time of the caucus, and of the meeting of the city committee, so far as their right

to participate in the caucus or be elected to the committee was concerned.

The statute which gives the election commissioners of Boston authority to recount the ballots cast at a caucus provides that they shall "recount said ballots and determine the questions raised; and such recount shall stand as the true result of the vote cast in such caucus": Stats. 1896, c. 435, sec. 4.

**538** The question is, What is meant by "the true result"? The defendants contend that the commissioners are to determine only who received the most ballots, and that the committee is the final judge of its own membership. We think that this is not the true construction. The words "shall stand as the true result" import not only a correct count, but something more—an element of finality.

A representative body made up of members chosen by or selected from a constituency which they represent is usually either expressly or from the nature of the case the judge of its own membership. But it was competent for the legislature to provide, as we think it has done in effect, that, in case of the disputed election at a ward caucus in Boston of a member of a political committee, the action of the election commissioners on a petition for a recount should settle the question as to who was elected. This construction is supported, we think, by other instances, in which like language has been or is used with the intention, it would seem, that the recount should be final. Thus it was provided by chapter 417, section 210, of the Statutes of 1893 that the recount by the board of aldermen of a city, or of a committee thereof, of the ballots cast upon the question of granting licenses for the sale of intoxicating liquors, "shall stand as the true result of the vote cast in such city upon the said question." This section was repealed by chapter 299, section 8, of the Statutes of 1895, and section 1 of the last-named act was substituted for it, and contains the same language. When this language is compared with that describing the effect of action under chapter 417, section 207, of the Statutes of 1893, we think that it is still more apparent that the recount by the election commissioners was intended in a case like the present to be final. The same language which we have been considering is used in chapter 530, section 12, of the Statutes of 1897, which was enacted after the election in question and which is a repeal of and substitute for chapter 435, section 4, of the Statutes of 1896. This statute expressly gives to the election commissioners the power to decide upon challenged votes, and thus removes any doubt, we think, respecting the finality of the recount, and shows that the



meaning which we have given to the language under consideration is the correct one, since it hardly is to be supposed that the legislature could have intended to use the same words in different senses in the two statutes.

<sup>539</sup> It is true that there is no way provided for notifying the result to the city committee, but all parties interested are bound to take notice of it.

The fact that the election commissioners are required to retain for three months all ballots cast at a caucus, and to "produce the same if called for by any court, justice, tribunal, or convention having jurisdiction of the same" (Stats. 1895, c. 507, sec. 22), does not control, we think, the express language of the statute in regard to the effect to be given to a recount. If no recount should be asked for, then it would be necessary that the question who was elected should be determined, in case of a dispute, in some other manner; and, with that contingency in view, the legislature well may have directed that the ballots should be retained, and should be produced before the convention, tribunal, justice, or court with which the decision would rest.

It follows, therefore, that in the contingency which has arisen the rule under which the city committee purported to act in seating the defendants did not justify their action, and that the plaintiffs are entitled to the offices to which they claim to have been elected.

Information in its present form to be dismissed, unless an amendment is allowed substituting the relators as plaintiffs, when a decree may be entered for the plaintiffs.

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**QUO WARRANTO AT INSTANCE OF ATTORNEY GENERAL.** Quo warranto lies to enforce both public and private rights. The attorney general has the right in the name and on the behalf of the commonwealth, at his own discretion, to file an information against one usurping a public office: Extended note to McPhail v. People, 52 Am. St. Rep. 312. The writ can issue only to a competent relator—one having an interest to warrant his interference. Where the question of one's right to office is a public one exclusively, it can be raised only by the attorney general: Commonwealth v. Cluley, 58 Pa. St. 270; 94 Am. Dec. 75, and note. See Commonwealth v. Union Ins. Co., 5 Mass. 230; 4 Am. Dec. 50.

**PUBLIC OFFICERS—WHO ARE.**—A public office is an agency for the state and the person whose duty it is to perform this agency is a public officer: State v. Stanley, 66 N. C. 59; 8 Am. Rep. 488. It imports an office in which is reposed some portion of the sovereign power of the state: Shelby v. Alcorn, 36 Miss. 273; 72 Am. Dec. 169, and monographic note on what is an office and how it may be distinguished from employment. See Hamlin v. Kassafer, 15 Or. 456; 3 Am. St. Rep. 176. Public offices are delegations of portions of sovereign power for the welfare of the people: Attorney General v. Jochim, 99 Mich. 358; 41 Am. St. Rep. 606, and note. For examples of persons held to be public officers, see McPhail v. People, 160 Ill.

77; 52 Am. St. Rep. 306, and note; and *Brown v. Russell*, 166 Mass. 14; 55 Am. St. Rep. 357.

**ELECTIONS—RETURNS BY ELECTION OFFICERS.**—Official return or canvass, when duly certified, is *prima facie* evidence that the result is as declared but is never conclusive unless made so by statute: *Hartman v. Young*, 17 Or. 150; 11 Am. St. Rep. 787; *Prettyman v. Supervisors*, 19 Ill. 406; 71 Am. Dec. 230; *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141. See *People v. Van Cleve*, 1 Mich. 362; 53 Am. Dec. 69.

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## McMAHON v. EAGLE LIFE ASSOCIATION.

[169 MASSACHUSETTS, 539.]

**JUDGMENT OF A SISTER STATE, EFFECT OF.**—A judgment of a court of another state involving the construction of certain certificates or policies is conclusive upon the parties in a subsequent controversy in this state.

**COURTS, JURISDICTION, PRESUMPTION OF.**—There is a presumption that a court of general jurisdiction of another state had the jurisdiction which it assumed to exercise in construing and enforcing contracts and determining their meaning.

W. Hamilton and W. H. Brooks, for the plaintiff.

J. B. Carroll and W. H. McClintock, for the defendant.

<sup>540</sup> ALLEN, J. These are actions upon judgments rendered by the district court of the third judicial district of Nebraska. The defendants appeared by counsel in that court, and filed their answers, and the cases were tried. Without denying the general jurisdiction of the court over the subject and over themselves, they contended that the amounts to be paid to the beneficiary under their respective certificates should not exceed in any case the amount realized by them from one assessment made upon all the members assessable at the death of the person insured; but it was determined otherwise. The defendants also moved to set aside the verdicts, on the ground that they were for too large sums; but the motions were overruled. The defendants do not now deny that the court was a court of record, with general jurisdiction; but while conceding that they were properly before the court, and that the court had general jurisdiction over the kind of subject involved in the litigation, they contend that, under their certificates or policies which were sued on, they were not liable to actions at law to recover fixed sums as damages, but only to a process to compel them to levy assessments, and that such a process would not be within the jurisdiction of the courts of Nebraska, the defendants not being incorporated in that state. This question involved the construction of the contracts upon which the defendants were sued,

and the decisions against them were decisions upon the merits. We cannot now revise those decisions. In the absence of evidence to the contrary, there is a presumption that the court, being a court of general jurisdiction, had the jurisdiction which it assumed to exercise in these cases, which were actions at law to enforce contracts: *Buffum v. Stimpson*, 5 Allen, 591; 81 Am. Dec. 767; *Knapp v. Abell*, 10 Allen, 485; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 273; *American Tube etc. Co. v. Crafts*, 156 Mass. 257; *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 389; *Freeman on Judgments*, sec. 565. The jurisdiction to construe and enforce contracts is within the ordinary powers of a court of general jurisdiction; and the determination of the meaning of the contracts of the defendants, and of the proper form of remedy, is conclusive upon us, so far as the present actions are concerned.

Exceptions overruled.

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**JUDGMENT OF SISTER STATE—CONCLUSIVENESS OF.**—A judgment rendered in one state has the same effect and is as conclusive in any other state where brought in controversy as in the state where rendered: *Peet v. Hatcher*, 112 Ala. 514; 57 Am. St. Rep. 45, and note. See *Gude v. Dakota etc. Ins. Co.*, 7 S. Dak. 644; 58 Am. St. Rep. 860, and note.

**JURISDICTION OF COURT—WHEN PRESUMED AS TO JUDGMENT OF SISTER STATE.**—The legal presumption, in the absence of contradictory evidence, is in favor of the jurisdiction of a court of record of another state which has assumed to exercise jurisdiction over the subject matter in a controversy between parties residing there: *Buffum v. Stimpson*, 5 Allen, 591; 81 Am. Dec. 767; monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 114. See *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 389, and note.

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## WHITING v. PRICE.

[169 MASSACHUSETTS, 576.]

**VENDOR AND PURCHASER, REPRESENTATIONS, WHEN ACTIONABLE.**—A representation of a vendor of a bond that it was secured by machinery and real estate of the value of half a million dollars cannot be regarded or excused as one of those generalities which, whether true or not, are to be expected from one who wishes to sell his goods, and, if the representation is fraudulent and induces the plaintiff to make a bargain different from the one which he thought he was making, it is actionable. It is not essential that the representation should have been intentionally fraudulent, if it was known to be false and was made with intent to bring about the sale.

Action for tort for false representations. The complaint alleged that the defendant sold to the plaintiff "a bond purporting to be a first mortgage bond, duly issued by the Jacksonville Elec-



tric Light Company, county of Duval, state of Florida, said bond being for the sum of one thousand dollars and interest, and being numbered 10; and to induce said plaintiff to buy, the said defendants falsely represented to him that said bond was good, of full value, a good investment, and secured by the machinery and real estate of the Jacksonville Electric Light Company, and of other companies, of the value of half a million dollars. And said plaintiff, believing that said representations were true, was thereby induced to purchase, and did purchase said bond, and paid therefor to the defendants the sum of one thousand and two dollars and seventy-two cents. And said bond was not good, of full value, a good investment, nor was it secured by the machinery and real estate of the value of half a million dollars of the Jacksonville Electric Light Company, or of any other companies, all of which said defendants then knew, said facts being within their means of knowledge; that said bond was and is of little or no value." At the trial, the plaintiff did not contend that the representations were intentionally fraudulent. The defendants therefore asked the judge to rule that the declaration would not support a verdict for the plaintiff, for the reason that the representations alleged were mere matters of opinion. The judge, ruling as requested, directed a verdict for the defendants.

G. A. Perkins, for the plaintiff.

W. H. Pond, for the defendants.

577 HOLMES, J. The representation that the bond was secured by the machinery and real estate of the Jacksonville Electric Light Company and of other companies of the value of half a million dollars, if fraudulent, went beyond the latitude allowed to sellers by the latest decisions of this court: *Kilgore v. Bruce*, 166 Mass. 136; *Andrews v. Jackson*, 168 Mass. 266; 60 Am. St. Rep. 390. Naming the company and going into particulars as it did, the statement could not be excused as one of those generalities which, whether true or not, are to be expected from a man who wants to sell his goods: *Homer v. Perkins*, 124 Mass. 431, 433; 26 Am. Rep. 677; *Roberts v. French*, 153 Mass. 60, 63; 25 Am. St. Rep. 611; *Way v. Ryther*, 165 Mass. 226, 229. It is alleged that the representation was false, and that the defendants knew it to be false. If so, it was fraudulent, even if not made for purposes of gain, and being made at a time when it was plain that it tended to induce the plaintiff to make a bargain different from the one which he thought he was making, if, as alleged, it had that effect, it was actionable: See *Stone v. Denny*, 4 Met. 151, 161; *Fisher v. Mellen*, 103 Mass. 503; *Litchfield v.*

Hutchinson, 117 Mass. 195; O'Donnell v. Clinton, 145 Mass. 461, 462, and cases cited; Holst v. Stewart, 154 Mass. 445, 446; Railton v. Mathews, 10 Clark & F. 934, 941, 944.

According to the bill of exceptions the ruling of the court was upon the declaration, and, this being so, the statement that the plaintiff did not contend that the representations were intentionally fraudulent cannot be taken to mean more than that he disclaimed a corrupt intent, which, as we have said, is not necessary to the cause of action, however improbable it may be that such representations, if known to be false, should be made with any intent except to bring about the sale. It was said at the argument that the case had been opened to the jury before the <sup>578</sup> ruling. Probably the disclaimer had reference to the evidence rather than to the pleading, and the judge may have been thinking of the opening rather than of the declaration when he ruled.

There is a negative pregnant in the declaration which would have to be considered seriously if we were not satisfied that nothing turned on it in this case. We mention it because it has become an every-day fault in Massachusetts pleading to give the negative the same particularity as the averment. Here the negative is that the bond was not secured by the machinery and real estate of the value of half a million dollars of the Jackson Electric Light Company, or of any other companies. This is consistent with the security's having existed to the value of four hundred thousand nine hundred and ninety-nine dollars: Gould on Pleading, 4th ed., c. 6, secs. 30, 32. But we assume that the declaration was intended and taken to deny the existence of any security of the kind alleged. It is unnecessary to consider whether insufficiency in the declaration justifies directing a verdict.

Exceptions sustained.

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**FRAUD—SALE OF STOCKS AND BONDS—FALSE REPRESENTATIONS—WHEN ACTIONABLE.**—No action can be maintained against the seller of stocks and bonds for false and fraudulent representations as to their value, if the buyer, not knowing the same, can, by ordinary diligence, ascertain it; but if he has no ready means of ascertaining it, and purchases, trusting to the honesty of the seller, by whom he is deceived and cheated, the action does lie: *Handy v. Waldron*, 18 R. I. 567; 49 Am. St. Rep. 794, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

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**HUDSON v. McKALE.**

[107 MICHIGAN, 22.]

**MORTGAGE OF CHATTELS—WHAT CONSTITUTES—AFTER-ACQUIRED PROPERTY.**—If one agrees to sell another a stock of goods, but reserves title in himself until the purchase price is paid, and it is provided that all “substituted goods, as well as all others used in the business,” shall be subject to the lien and operation of the agreement, the contract, as to property subsequently acquired, including stock purchased by the vendee, operates as a mortgage, and is void as to creditors of the buyer unless it, or a copy thereof, is filed as required by statute.

Replevin by Lester S. Hudson against William H. McKale for goods seized upon attachment as the property of a third party. The court directed a verdict for the plaintiff, and from a judgment thereon the defendant appealed.

William A. Fraser and Sloman, Groesbeck & Robinson, for the appellant.

M. V. & R. A. Montgomery, for the appellee.

<sup>23</sup> MONTGOMERY, J. Plaintiff was, prior to the fifteenth day of August, 1892, the owner of the stock and fixtures in a saloon in the city of Lansing. On that day he made a conditional sale of the property to one C. M. Webb. The contract provided that the title to the property should remain in the plaintiff until the purchase price was paid. One-half the consideration was paid down, and the rest was to be paid in installments. The contract, which was signed by both parties, contained the following provisions: “Said second party does severally agree to pay said first party the full and true sum of four thousand (\$4,000) dollars, and the interest herein provided, according to the terms of this agreement; to use with care the property hereby in-



trusted to his care and use; to replace such of said property as is broken or destroyed; and to submit such substituted goods, as well as all others used in the above business, property, and chattels, to the lien and operation of this agreement."

After the purchase, Webb continued the business at the old stand, but in his own name, and bought goods on credit. Among others who sold him goods were Sloman & Co., who caused a levy to be made by the defendant, as constable, on goods purchased in the name of Webb, and shipped to him, and received into the saloon. Plaintiff brought replevin. On the trial, the circuit judge directed a verdict for the plaintiff, and defendant brings error.

The circuit judge evidently treated the agreement that all stock purchased by Webb should become the property of Hudson as a sale of the property to Hudson; and, there being no evidence that there was fraud in fact on the part of Hudson, the court held that the rights of the parties were governed by section 6190 of 2 Howell's Statutes, and that the title passed.

Section 6193 of 2 Howell's Statutes, provides that every mortgage, or conveyance intended to operate as a mortgage, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an <sup>24</sup> actual and continued change of possession, shall be absolutely void, as against creditors of the mortgagor, unless the mortgage or a copy of it be filed, etc. As to instruments falling within its terms, this latter section has superseded section 6190: *Cooper v. Brock*, 41 Mich. 491. We are agreed that this instrument was one which, as to the property subsequently acquired by Webb, was intended to operate as a mortgage. There is no pretense that Hudson was to acquire any title, except as security for a debt, nor can it be contended that his title would continue after the debt was paid. It is true this court has gone far in sustaining conditional sales reserving title in the original owner, but to sustain plaintiff's contention here would open a door to great injustice, and would be going a step beyond any ruling which this court has ever made. If this contention should prevail, one might make a sale of a single bale of cotton cloth to a merchant, and by contract acquire a secret title to all goods thereafter placed in stock, while, as to the general public, the stock might appear to be free from all encumbrances.

The case of *Blanchard v. Cooke*, 144 Mass. 207, cited by plaintiff's counsel, does not support his contention. In that case, the plaintiff had taken possession of the goods before any lien attached in favor of creditors. The court held it to be sufficient

to make the mortgagee's lien effectual "if the property is delivered to him before, and is retained by him until, the rights of third persons have attached." But it was said in the case, distinctly: "As the effect of the contract is that Cooke covenants that the legal title to a fractional part of the after-acquired goods shall vest in Blanchard as security for the payment of the debt due to him, Blanchard's position, even in equity, ought not to be better than if he held an unrecorded mortgage of these after-acquired goods as security for the debt; and a mortgage of after-acquired goods cannot, in any event, give a better title than a mortgage of goods belonging to the mortgagor when the mortgage is executed."

<sup>25</sup> This latter reasoning we deem sound; but, while it is not necessary to a decision of this case, it is proper to say that the ruling upon which *Blanchard v. Cooke*, 144 Mass. 207, would appear to have turned is not in harmony with the holdings of this court in *Fearey v. Cummings*, 41 Mich. 376, *Waite v. Mathews*, 50 Mich. 392, and *Crippen v. Jacobson*, 56 Mich. 386.

The judgment will be reversed, and a new trial ordered.

The other justices concurred.

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**CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY—RECORDING.**—An instrument clearly intended to pass the ownership of personal property, and reserving a lien to the seller for the purchase price, is a chattel mortgage: Note to *Lumbert v. Woodard*, 55 Am. St. Rep. 180; and, in some cases, it is held that after-acquired property or substituted articles become subject to it: Note to *First Nat. Bank v. Lindenstruth*, 47 Am. St. Rep. 370; *Francisco v. Ryan*, 54 Ohio St. 307; 56 Am. St. Rep. 711. Chattel mortgages, to be valid against creditors, etc., without notice, must be recorded when the mortgagor retains possession of the property: Note to *Brown v. James H. Campbell Co.*, 21 Am. St. Rep. 282. An unrecorded mortgage of future acquired chattels without possession of the property is void, as against creditors, in Illinois: *Gregg v. Sanford*, 24 Ill. 17; 76 Am. Dec. 719.

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## HAND v. OSGOOD.

[107 MICHIGAN, 55.]

### CONTRACTS—STATUTE OF FRAUDS—LEASE OF LANDS.

An executory parol agreement to make a lease of lands for one year, with the privilege of three, at an annual rental, is void under the statute of frauds, and no action can be founded thereon. It cannot, therefore, be made a basis on which to recover damages for a breach of contract.

Assumpsit by Heman Hand against Edmund Osgood, for the breach of a parol contract for a lease. There was a judgment for the plaintiff, and the defendant appealed.

Patterson & Flynn, for the appellant.

Wood & Bird and Walter C. Burrige, for the appellee.

**56** GRANT, J. Plaintiff instituted this suit to recover damages for the violation of an executory parol agreement that defendant would execute a lease to him of certain lands for one year, with the privilege of three, at the annual rental of one hundred dollars per year. The court instructed the jury that, if they found such to be the contract, the plaintiff was entitled to recover as damages the difference between the market value of the lease and what he agreed to pay for it.

It is conceded that, if this was a contract for a lease for a longer period than a year, it is void under the statute of frauds: 2 Howell's Statutes, sec. 6181. It is settled that such a contract, unexecuted, cannot form the basis of an action or of a defense: *Salb v. Campbell*, 65 Wis. 405; *Carney v. Mosher*, 97 Mich. 554; *Grimes v. Van Vechten*, 20 Mich. 410; *Hall v. Soule*, 11 Mich. 494. The contention of the plaintiff is, that the contract may be performed within one year, and is therefore good for that period, in support of which he cites *Barton v. Gray*, 57 Mich. 634; *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; *Blake v. Voight*, 134 N. Y. 69; 30 Am. St. Rep. 622.

In *Whiting v. Ohlert*, 52 Mich. 462, 50 Am. Rep. 265, the sole question decided was that a parol agreement for a year's lease, to begin in the future, is valid. *Barton v. Gray*, 57 Mich. 634, goes no further than to hold that the statute of frauds does not apply to contracts which leave it uncertain whether they may or may not be performed within a year, or which depend upon a contingency that may happen within the year. *Blake v. Voight*, 134 N. Y. 69, 30 Am. St. Rep. 622, holds that a verbal contract which contains an option allowing either party to terminate it within a year is not within the statute, although without the option it would be within the statute.

**57** Neither of these cases is like the present, or affords any light in construing this contract. Counsel for the defendant do not argue the question, but assume that the lease was to be for three years. We have been unable, after considerable search, to find any case involving such a contract, or one which affords us any light. We think, however, upon principle, that it is within the mischief which the statute is designed to prevent. The contract contemplated a lease for three years, and, so far as the defendant is concerned, it is absolute. Plaintiff has not exercised his option, and asked for a contract for a year. He comes into court relying upon a parol contract by which he was entitled to a lease



for three years. His case appears to have been tried upon that theory, for his damages were not limited to one year. The defendant could not have complied with the contract by tendering a lease for a year, nor could the plaintiff compel the execution of a lease for a year, because such contracts contemplate the exercise of the option after the execution of the lease. It follows that the agreement is void under the statute, and cannot, therefore, be made the basis for a recovery for a breach of contract.

Judgment reversed, and new trial ordered.

The other justices concurred.

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**PAROL LEASE FOR A TERM OF YEARS—VALIDITY OF—**  
**STATUTE OF FRAUDS.**—A parol agreement for a lease of lands for more than a year is void: *Wallace v. Scoggins*, 18 Or. 502; 17 Am. St. Rep. 749. An oral lease for a year at a fixed rental, and for a year thereafter at an increased rent, is but a single letting, and void under the statute of frauds: See monographic note to *Wallace v. Scoggins*, 17 Am. St. Rep. 753, on the effect of a parol lease for more than one year.

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## BARTLETT v. STEAM DREDGE.

[107 MICHIGAN, 74.]

**SHIPPING—STEAM DREDGE—WHETHER A WATER-CRAFT.**—The sole purpose of a steam dredge is to dig, not to navigate; and the "watercraft" law cannot be construed to include a dredge that is not used for the transportation of passengers, freight, or even the material brought up by it from the beds of rivers or lakes. No lien can, therefore, be enforced against it, for labor and materials furnished in its construction, under a statute giving a lien for labor and materials furnished upon "every watercraft used, or intended to be used, in navigating the waters of this state."

Suit by Bartlett & Co. against certain steam dredges and Carkin, Stickney & Cram, to enforce a lien under the water-craft law. There was a decree for the defendants, and the complainant appealed.

T. E. Tarsney, W. W. Wicker, and H. D. Goulder, for the complainant.

Elbridge F. Bacon and Harlow P. Davock, for the defendants.

**74 GRANT, J.** The complainant furnished labor and materials for the construction at Saginaw, Michigan, of the two dredges involved in these suits. The contracts were made with Carkin, Stickney & Cram. These suits were instituted to enforce liens upon the dredges for such labor and material, under chapter 285 of 2 Howell's Statutes. As described by the defend-

ants, "the dredge hull is virtually a large scow, with a boiler, engine, and different kinds of machinery, a crane, or boom, and a dipper. It has no means of propulsion, except by towing, nor any rudder. The dredge is used for digging material under water, and is not used for transportation. It is the same thing as a steam shovel on <sup>65</sup> land. It has no master, and is not used for transporting passengers, freight, or anything."

The sole purpose of these dredges was to dig, not to navigate. They are not moved from place to place for the purpose of navigation, as are vessels engaged in commerce, nor are they intended to be used for transporting passengers or freight, or the material which they bring up from the lake or river beds.

The act providing for liens is entitled "An act to provide for the collection of demands against water craft." The second section reads as follows: "Every water craft of above five tons burden, used or intended to be used in navigating the waters of this state, shall be subject to a lien thereon," etc. It certainly would be a forced construction to hold that such structures are "used or intended to be used in navigating the waters of this state." If this were so, then every structure built so that it could be towed over the water to do work at different places must be held to be a water craft, under this law.

The term "vessel" is defined by Congress as including "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water": U. S. Rev. Stats., sec. 3. A dredge is incapable of being used as a means of transportation on the water, except by removing its machinery, and transforming it into something for which it was never intended to be used. Barges are vessels within the admiralty jurisdiction, and subject to maritime liens: *The Dick Keys*, 1 Biss. 408; *Disbrow v. The Walsh Brothers*, 36 Fed. Rep. 607. So, also, is an old steamboat, with all its machinery removed, and fitted up as an excursion boat: *Mosser v. The City of Pittsburg*, 45 Fed. Rep. 699. So, also, are lighters used in conveying lumber to vessels lying in deep water: *The General Cass*, 1 Brown Adm. 334. So it has also been held that a dredge and scows are to be treated as one concern, subject to a maritime lien: *The Starbuck*, 61 Fed. Rep. 502; *The Alabama*, 22 Fed. Rep. 449. It was said in <sup>76</sup> the latter case: "The dredge boat by itself might not be up to the test." It has also been held that a floating elevator used in the harbor of New York was subject to a maritime lien: *The Hezekiah Baldwin*, 8 Ben. 556. The Baldwin was in fact a canal boat, with an elevating apparatus attached, for the purpose of transporting grain from one vessel to another,

and was moved about the harbor for that purpose. She was nothing more than a floating vessel directly engaged in commercial movements, just as much as were the barges and lighters in the above-cited cases.

The *Aitcheson v. Endless Chain Dredge*, 40 Fed. Rep. 253, directly sustains the complainant, and holds a steam dredge to be a subject of admiralty jurisdiction. The opinion disposes of this branch of the case in a single sentence, at page 254, and treats the question as settled by the above cases of *The Baldwin*, 8 Ben. 556, *The Alabama*, 22 Fed. Rep. 449, and also *The Pioneer*, 30 Fed. Rep. 206; *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269. The opinion also says that the court has incidentally held likewise in *Maltby v. Steam Derrick Boat*, 3 Hughes, 477, and *Inland etc. Coasting Co. v. The Commodore*, 40 Fed. Rep. 258. *The Pioneer*, 30 Fed. Rep. 206, directly supports the decision. In the *Woodruff* case it was held that a contract for a floating boathouse is a maritime contract, by reason of the subject matter. The structure in that case was a float used to afford persons a means of egress from small boats coming to the slip to the adjoining wharf, and thence to the shore. The *Maltby* case was decided upon the rule governing salvage cases. The court says at page 478: "It is contended in argument that a derrick boat is not the subject of this jurisdiction, because it is not used in commerce and navigation. This might be a valid objection if the libel were for contract of affreightment, or for tort by collision, or such cause of action; but it is not a valid objection to a libel for salvage. It has long been held that property, whether it has been an actual instrument or subject of commerce, or not, may be the subject of salvage."

<sup>77</sup> In all the cases cited by the learned counsel for the complainant, excepting those of *The Pioneer*, 30 Fed. Rep. 206, *The Aitcheson*, 40 Fed. Rep. 253, and *Maltby v. Steam Derrick Boat*, 3 Hughes, 477, the floating structures were all directly and immediately used, and intended to be used, in maritime transportation. The following cases appear to be directly opposed to the contention of the complainant: *Knisely v. Parker*, 34 Ill. 481; *The Nithsdale*, 15 Can. L. J. 268; *Olmsted v. McNall*, 7 Blackf. 387; *The Farmers' Delight v. Lawrence*, 5 Wend. 564; *The Hendrick Hudson*, 3 Ben. 419; *The Big Jim*, 61 Fed. Rep. 503; *Ruddiman v. A Scow Platform*, 38 Fed. Rep. 158; *Parkinson v. Manny*, 2 Grant Cas. 521; *Nease's Appeal*, 3 Grant. Cas. 110. This subject has very recently been carefully examined and reviewed by the United States court for the eastern district of Michigan in *Muellerweisse v. Pile Driver etc.*, 69 Fed. Rep.



1005, in which Judge Swan reached the conclusion that such craft are not vessels, within the maritime law. He also says that the case of *The Pioneer*, 30 Fed. Rep. 206, is irreconcilable with those of *The Hudson*, 3 Ben. 419, *The Pulaski*, 33 Fed. Rep. 383, *Ruddiman v. A Scow Platform*, 38 Fed. Rep. 158, and *The Big Jim*, 61 Fed. Rep. 503. Whatever may be the rule in the federal courts, we cannot construe the water craft law of Michigan to include a dredge.

It follows that the decree must be affirmed, with costs.

The other justices concurred.

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**STEAM DREDGE AS A VESSEL.**—The question as to whether a steam dredge is a vessel is one that appears not to have been frequently before the state courts, and we find nothing in conflict with the conclusion reached in the principal case and in *Muellerweisse v. Pile Driver etc.*, 69 Fed. Rep. 1005, therein cited.

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## KUPPENHEIMER v. WERTHEIMER.

[107 MICHIGAN, 77.]

**SALES BY SAMPLE—RIGHT OF INSPECTION.**—If goods are bought by sample, the right to inspect before acceptance always exists; and, if the goods are not up to the sample, the buyer has a right to refuse them. The buyer cannot be required to inspect the goods at the shipping point, but is entitled to a reasonable opportunity to do so after their arrival.

**SALES BY SAMPLE—WHEN TITLE PASSES UPON DELIVERY TO CARRIER.**—If goods in Illinois are verbally ordered, by sample, to be shipped here, with the privilege of examination, to see if they correspond with the sample, the price to be remitted at once if they do so correspond, it is an Illinois contract, and, in the absence of any understanding that title shall not pass until the goods are inspected, the sale is complete, and title passes upon delivery of the goods to the carrier, subject to the right of inspection.

Assumpsit by Bernhard Kuppenheimer and others against William Wertheimer and Max Wertheimer for goods sold and delivered. There was a judgment for the plaintiffs, and the defendants appealed.

Sloman, Groesbeck & Robinson, for the appellants.

Bowen, Douglas & Whiting, for the appellees.

**78 HOOKER, J.** The plaintiffs, who are wholesale dealers in clothing at Chicago, Illinois, recovered judgment against defendants, retail dealers at Detroit, Michigan, for the value of a bill of clothing shipped to them upon their order. The order was given by defendant Max Wertheimer at plaintiffs' store, the goods being ordered from samples shown him. The defendant

testified that the goods were to be shipped the same day by express, to Detroit, where he was to have the privilege of examining them, and, if found to be like the samples, they were to be paid for. The plaintiffs offered testimony tending to show that the defendant did not direct shipment by express, but that the goods were to be shipped to defendants at Detroit, and they were to check them off to see whether they were as ordered, and then remit for the same. The jury must have found with the plaintiffs upon the subject of shipment, for the court instructed them that the plaintiffs could not recover if shipment was to be made by express. <sup>79</sup> The amount of this bill was upward of four hundred dollars, and, as no money was paid, it was within our statute of frauds if it was a Michigan contract. If, on the other hand, it was an Illinois contract, it is apparently conceded to have been valid. Hence prominence is given to this question in the briefs of counsel.

The goods were ordered in Chicago. Plaintiffs contend that delivery to the carrier completed the sale, and that payment was to be made in Chicago, and therefore it was an Illinois contract. On the other hand, defendants contend that this delivery to the carrier was merely for transportation to Michigan, where the defendants should be allowed to inspect the goods, to determine whether or not they were the goods ordered; that this condition forbids the inference, from the fact of delivery to the carrier, of a receipt and acceptance as elements of a present sale. Their counsel cite the case of *Rindskopf v. De Ruyter*, 39 Mich. 6, 33 Am. Rep. 340, in support of this proposition.

It is the usual rule that title passes under a valid contract of sale when nothing remains to be done by the vendor in relation to the appropriation or delivery of the goods, although the property sold is not specific: 1 Benjamin on Sales, Corbin's ed., sec. 469; *Carpenter v. Graham*, 42 Mich. 191; *Byles v. Colier*, 54 Mich. 1; *Wagar v. Detroit etc. R. R. Co.*, 79 Mich. 650, and cases cited; *Lingham v. Eggleston*, 27 Mich. 324. Delivery to a public carrier for transportation to the purchaser is, in the absence of circumstances showing a contrary agreement, usually held to be a delivery to the purchaser, through his agent, the carrier: 21 Am. & Eng. Ency. of Law, 528, and cases cited. Apparently, counsel for the defendants do not question these rules, but contend that the stipulation in regard to inspection shows that the parties did not intend that title should pass by delivery to the carrier.

The case of *Rindskopf v. De Ruyter*, 39 Mich. 1, 33 Am. Rep. 340, would at first blush seem to support this contention. In

that case, liquors were ordered verbally at Grand Rapids by defendant from the plaintiffs' agent, but under the condition that <sup>80</sup> the liquors should be sent to be first examined, and then to be kept or returned, as it should or should not appear that they answered the requirements of the understanding under which the order was made. The order was subject to the plaintiffs' approval. Wisconsin had a statute similar to our own, under which delivery and acceptance were necessary to make this contract valid, and the court held that delivery to the carrier for transportation was not such a delivery as would take the case out of the statute. A large number of cases were cited in support of this proposition, which is clearly correct, on the principle that the vendor cannot, by his own act alone, take the case out of the statute. And under these authorities the delivery to the carrier would not have had that effect, although there had been no agreement in relation to keeping or returning the goods. That case turns on the question, "Was there any receipt or acceptance in Wisconsin in the sense of the statute of frauds? Unless there was, no binding sale was there effected. . . . The only act of receipt and acceptance in Wisconsin was by the carrier."

But the opinion goes further, and says that even this act of acceptance by the carrier was under and expressly subject to an arrangement which forbids inferring from it a receipt and acceptance as elements of a present sale; that under the finding of the referee the carrier received the goods simply for carriage to Michigan, and in order that they might, upon arrival, be examined with a view to their change of ownership, upon terms agreed on, if found to correspond with the previous understanding. It would seem that, under the evidence in that case, it was found that the intention of the parties was not to pass title until after inspection, when the vendee had an option to accept or reject, subject, necessarily, to a right of action for breach of contract if they were unjustly returned, had the executory contract been binding. Thus the court determined that case upon two grounds, <sup>81</sup> either of which was sufficient to show that title did not pass by delivery to the carrier.

In the present case, there is no evidence of an understanding that the property should not pass until inspected. Nothing was said about transporting to Detroit with a view to change of ownership only after acceptance. It is true that the goods were to be examined, and the price remitted at once, if found correct; but the agreement was silent as to this inspection being with a view to a change of ownership. The right to inspect before acceptance always exists, and a purchaser cannot be required to inspect



at the shipping point, but is entitled to a reasonable opportunity after the arrival of the goods: *Fogel v. Brubaker*, 122 Pa. St. 7; 2 Benjamin on Sales, Corbin's ed., secs. 910, 966; *Erwin v. Harris*, 87 Ga. 333. If the goods are not up to the sample, the right to refuse them exists, which is, in effect, a rescission. The title passes upon delivery to the carrier, subject to this right, of which the purchaser may avail himself or not. Upon the facts shown, the court properly held that title passed by delivery to the carrier.

We think that this disposes of the questions raised, and that the judgment of the circuit court should be affirmed.

The other justices concurred.

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**SALES BY SAMPLE—DELIVERY TO CARRIER.**—The delivery of goods to a carrier, for transportation, where no conditions are imposed, passes the title, although the purchase money is afterward collected by the vendor at the place from which the goods were ordered: *Note to Scharff v. Meyer*, 54 Am. St. Rep. 684. But, on a sale by sample, the delivery of goods to a carrier does not constitute delivery to the consignee so as to pass title, and make the consignee liable for them, if they do not correspond in quality and quantity with the order: *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 728.

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## TUBBS v. MICHIGAN CENTRAL RAILROAD COMPANY.

[107 MICHIGAN, 108.]

**RAILROADS—STATUS OF PERSON HAVING BUSINESS AT STATION.**—One at a railroad station for the necessary and customary purpose of receiving mail and express matter from a train, is there by invitation, and is entitled to the same protection as a passenger.

**RAILROADS—NEGLIGENCE—RUNNING TRAIN AT STATION.**—It is negligence for a railroad company to run a train between its passenger house and another train opposite the station, engaged in discharging passengers, mail, and express matter.

**RAILROADS—NEGLIGENCE—WAITING FOR TRAIN TO COME TO A STANDSTILL.**—It cannot be said, as a matter of law, that persons having business with a railroad train at a way station, at which the stop is but momentary, are guilty of contributory negligence in not waiting until the train comes to a standstill. It is usual for them to take their position near the track and wait for the train to stop; and this custom is so general that it must be within the knowledge of those operating trains.

**RAILROADS—CONTRIBUTORY NEGLIGENCE—TAKING MAIL POUCH FROM TRACK.**—If a person is at a railroad station for the purpose of receiving mail and express, and a mail agent throws off a mail pouch in front of a train advancing from the opposite direction, while the train from which it is thrown is still in motion, the question as to whether such person was guilty of contributory negligence in springing to take up the pouch, without look-

ing to see whether another train was approaching, is a question for the jury, especially where he knew that it was not the custom for trains to so pass at that point.

**PLEADING—VARIANCE—WHEN NOT FATAL.**—If a person is at a railway station to get mail and express matter, but is injured by an incoming train while he is trying to pick up a mail pouch thrown from another train, as the proof shows, by a mail agent, upon the track in front of the train coming in, and he brings suit for the injury, there is not a fatal variance, although the declaration alleges that the defendant was engaged in transporting the mail, and that it was customary for it to deliver the mail to the plaintiff at the place where the accident occurred.

Case by Lucius Tubbs against the railroad company for personal injuries. The court directed a verdict for the defendant, and from a judgment thereon the plaintiff appealed.

A. J. Sawyer, for the appellant.

John F. Lawrence, for the appellee.

**111 MONTGOMERY, J.** This is an action for negligent injury. The plaintiff has for several years been employed in receiving the mail from mail trains run on the defendant's road, and transporting it to the postoffice at the village of Dexter. At the Dexter station the defendant's road consisted of a double track, which extended from a point a short distance east of the station, westward, at least as far as Jackson; but from the point of convergence east of and near the station there was but a single track extending eastward. The station at Dexter was a short distance south of the track. In the conduct of defendant's business, western-bound trains were run on the north track, and eastward-bound trains on the south track. The passengers to and from and others having business at the westbound trains were required to cross the south track to reach the train. The injury occurred to the plaintiff while receiving mail from the westward-bound train, which was called the "Grand Rapids Train," or "No. 15." While thus engaged, he was struck by the engine of the eastward-bound train, known as "No. 20."

Plaintiff offered testimony that tended to show that No. 15 was due at Dexter at 6:07, and that No. 20 was due there at about 6:15, but, as it did not stop at Dexter, had no scheduled time for this station; that for some years, at least, prior to the injury, the custom was for No. 20 to approach the station under complete control of the engineer; and, if No. 15 was at the station, No. 20 stopped west of the station until No. 15 had discharged her passengers, mail, and express, when No. 20 would pass through on the south track; if No. 15 had not yet reached the station, No. 20 would run past the station, and wait on the

south track, east of the station, until No. 15 came in, when No. 20 would pull out east. There is also testimony tending to show that No. 20 was not accustomed to pass the station east without a signal. The testimony of the plaintiff shows that he was familiar with the custom of No. 20 stopping west of the station while No. 15 discharged and received passengers; that he had been to <sup>112</sup> the train every day for years prior to the injury, and had never known No. 20 to pull up to or pass the station while No. 15 was opposite the station, discharging passengers, but, on the contrary, it was of frequent occurrence for No. 20 to stop west of the station for that purpose.

On the occasion in question (September 29, 1892), plaintiff came to the depot on his usual mission, heard and saw No. 15 coming, wheeled his truck from the east corner of the stationhouse to a point some little distance west of the stationhouse, and a point where he was in the habit of receiving mail and express, seated himself on his truck, and awaited the arrival of No. 15. No. 15 went a little further west than was customary. The mail messenger threw off two sacks of mail, one of which rolled on the north rail of the south track. Plaintiff sprang to get it, to throw it on the truck, and, while in the act of doing so, was struck by No. 20, going east. He testifies that he did not know of the approach of No. 20; that it was his intention to throw the mail across the track, and then run up beside train No. 15, get his express, and step across to the walk, out of the way of No. 20 or any other train that came along at that time, as he supposed it would soon. The evidence tends to show that, when plaintiff was struck by No. 20, No. 15 was still in motion, just coming to a stop. There was testimony that, from a point two hundred feet west of the station, the engineer of No. 20 could have seen the headlight of No. 15 fifteen hundred feet to the east; and it is contended that, knowing of the custom of No. 15 to stop on the north track, and of the necessity of those having business at the train, as well as passengers, to cross the south track, it was an act of negligence for train No. 20 to run between train No. 15 and the stationhouse before the business of discharging passengers, mail, etc., was completed. The circuit judge, while expressing doubt as to the negligence of the defendant, directed a verdict on the ground that plaintiff was guilty of contributory negligence.

In determining this question, the most favorable construction <sup>113</sup> to which plaintiff's testimony is open must be given. In view of this testimony, was it negligence, as a matter of law, for plaintiff to fail to look to the west, or had he a right to rely



upon defendant's train not passing over the south track while he was engaged in the manner stated? This precise question has never before been considered in this court, but cases similar have arisen in at least four other states. The leading case on this point is *Klein v. Jewett*, 26 N. J. Eq. 474. In that case, passengers were required to pass over a track to reach that upon which an outgoing train awaited them. The plaintiff, on hearing the signal, approached the train he intended to take passage on, stepped from the platform to the track just as the passenger train stopped, and was making his way from the point where he first stepped on the track to the platform, between the second and last car, with his back to the east, when the locomotive of a western-bound train, running on the track between the station and the standing train, struck him. Plaintiff was permitted to recover, the court saying: "The plaintiff, in attempting to pass from the depot to the cars, in the absence of all warning of danger, had a right to regard himself in a place of safety, where he might safely give his whole attention to the business in hand, and was not bound to be on the lookout for extraordinary perils created by the gross mismanagement of the persons in charge of the road."

The court in that case recognized the rule requiring persons about to cross a track to look out for approaching cars, but it was said: "This rule has no application to the case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to the cars."

In *Terry v. Jewett*, 78 N. Y. 338, deceased left the station, walked diagonally toward the cars, across an intervening track, and, as the passenger train approached, the <sup>114</sup> freight train struck her. According to the testimony of one of the witnesses, the train came to a standstill, and then started a little, and thus it would appear that the deceased had some reason for supposing that the train had started on its way, although it seems that she was mistaken in respect to its going on. The court said: "She evidently, however, was impressed with the necessity of haste in reaching the train, and she proceeded on without looking to see whether any other train was approaching. Had she done so, she would, no doubt, have seen the freight train, and avoided the accident. There would have been no impropriety in her moving toward the passenger train had she exercised due care and caution, as she had reason to believe that the train was near at hand, and there was an implied invitation to cross the track. This was an assurance that she could do so with entire safety,

but did not justify negligence on her part." The court further said: "It was, we think, a question of fact for the jury to decide whether the deceased, under all the circumstances, was chargeable with contributory negligence." A similar ruling was made in *Brassell v. New York Cent. etc. R. R. Co.*, 84 N. Y. 241, and the doctrine of *Klein v. Jewett*, 26 N. J. Eq. 474, was followed by the supreme court of Colorado in *Denver etc. R. R. Co. v. Hodgson*, 18 Colo. 117.

These cases clearly sustain the contention of plaintiff that it was negligent for the railroad company to run a train between the stationhouse and a train opposite the station, engaged in discharging and taking on passengers, and that it is not negligence per se to attempt to board a train so standing without looking for an approaching train; that it is for the jury to decide whether, in view of the invitation to board or alight from the train, the passenger was not entitled to assume that the way was clear; and that the rule requiring one approaching a railroad crossing to look and listen does not apply in all its strictness to a passenger acting on such <sup>115</sup> an invitation. Nor do we think that one having necessary and customary business with those on the train, as in case of the plaintiff in the present case, for the purpose of receiving mail and express, stands in any different relation to the company than one intending to take passage on the train. Both are there by invitation, and neither as a mere licensee: *Thompson on Carriers*, 106.

Defendant's counsel cites the case of *Connolly v. New York etc. R. R. Co.*, 158 Mass. 8, which lays down a rule somewhat at variance with the cases to which reference has been made. This case, as well as *Debbins v. Old Colony R. R. Co.*, 154 Mass. 402, was determined by a majority of the court, and the views of the minority are not given; but we think the decision by the majority does not in either case furnish an answer to the cogent and convincing reasoning in the New Jersey and New York cases. Defendant's counsel also cites the case of *De Kay v. Chicago etc. Ry. Co.*, 41 Minn. 178; 16 Am. St. Rep. 687; but that case is clearly distinguishable, as well from the New York, New Jersey, and Colorado cases as from the present. In the *De Kay* case the standing train was on a sidetrack, which, the court said, "was not the designated or appointed place for the egress or ingress of passengers. The place for that was at the platform. . . . It [the train] was run in upon the sidetrack solely for the purpose of letting another train pass."

The question still remains whether it can, in the present case, be said that the plaintiff was invited to take the position he did

before the western-bound train came to a stop. We think this was a question for the jury. We cannot say, as a matter of law, that persons having business with a train at a way station, at which the stop is but momentary, are guilty of negligence in not waiting until the train comes to a standstill. It is a fact open to every-day observation that those awaiting the arrival of a train do not wait until the train stops, but, on the contrary, as the train approaches, those having business with the train take their position near the track, and wait for the train to come to a standstill. Indeed, this custom <sup>116</sup> is so general that it must be within the knowledge of those operating trains.

It is contended that there was a fatal variance between the declaration and the proofs, and for that reason the judgment should be affirmed. The declaration asserts that defendant was engaged in transporting mail, and that it was the custom for defendant to deliver the mail to plaintiff at the point stated; while it is said that the proofs show that the mail was delivered by the United States mail agent. We think this is too technical a view. It is true the mail agent actually threw the pouch from the train, but this he could not have done had not the train conveyed it to the spot, and afforded opportunity for its delivery. The gravamen of the charge was that, in view of the custom thus to furnish opportunity to plaintiff to receive the mail, defendant neglected its duty in making the place at which the mail was to be received reasonably safe. A different question would be presented if a direct injury had resulted from the throwing off of the pouch by the mail agent. No negligence in this regard was charged.

The judgment will be reversed, and a new trial ordered.

The other justices concurred.

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**RAILROADS—STATUS OF PERSONS LAWFULLY UPON PREMISES OF.**—As to who are passengers, and when they become such, as well as the duty of a railroad company to those lawfully upon its premises, see *Illinois Cent. R. R. Co. v. O'Keefe*, 168 Ill. 115; ante, p. 68, and monographic note thereto, discussing the subject at length.

**RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—A railroad company must exercise the utmost care and diligence to avoid running over a person on its track: *East Tennessee etc. R. R. Co. v. St. John*, 5 Sneed, 524; 73 Am. Dec. 149. Conflicting evidence as to negligence should be submitted to the jury: *Simmons v. New Bedford etc. Co.*, 97 Mass. 361; 93 Am. Dec. 99; and, even where the facts are undisputed, negligence is a question for the jury, if different minds may reasonably draw different conclusions as to the existence of negligence: *Brotherton v. Manhattan etc. Co.*, 48 Neb. 563; 58 Am. St. Rep. 709.



## PEOPLE v. SEAMAN.

[107 MICHIGAN, 848.]

**EVIDENCE OF OTHER LIKE OFFENSES.**—If it is necessary to show a particular intent in order to establish the offense charged, evidence of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent.

**EVIDENCE OF OTHER LIKE CRIMES.**—IF A FELONIOUS INTENT is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain.

**HOMICIDE — ABORTION — EVIDENCE OF GUILTY KNOWLEDGE AND INTENT.**—If it becomes necessary, in a prosecution for manslaughter, in procuring an abortion, to show defendant's guilty knowledge and intent, owing to the theory of the defense that the premature birth was due to accidental causes, and that death resulted from natural causes, it may be done by proof that the defendant had produced other abortions in the same house.

**HOMICIDE—ABORTION—ELECTION OF COUNTS.**—If an information for manslaughter, in procuring an abortion, contains three counts, the first, charging the use of drugs, the second, the use of an instrument, and the third, the employment of means unknown, the court does not err in not compelling the prosecution to elect upon which count it relies, where such election is made upon the submission of the case to the jury.

**MARRIAGE AND DIVORCE—MARRIAGE CONTRACT WITHOUT CEREMONY—VALIDITY OF.**—A marriage contract, without ceremony, is not valid where a ceremonial marriage between the parties would be unlawful, as where one of them has a husband or wife living.

**EVIDENCE—ADMISSIBILITY—FALSITY OF DEATH CERTIFICATE.**—In a prosecution for manslaughter, in procuring an abortion, evidence that, after the woman's death, a registered letter, containing a money order, payable to her order, was delivered to the one who had cared for her, that the defendant indorsed the order in her name, and that the money was obtained thereon, is admissible to prove the known falsity of the death certificate, afterward issued by the defendant, and in which the deceased was given another name.

**EVIDENCE, SECONDARY—INSTRUMENT BEYOND JURISDICTION.**—If a cablegram is without the jurisdiction of the court, and an unsuccessful effort has been made to obtain it, parol evidence is admissible to show the nature of the instrument.

**HOMICIDE—ABORTION—PROPER INSTRUCTIONS.**—In a prosecution for manslaughter, in procuring an abortion, it is error to refuse to instruct the jury that, if they believe the deceased aborted from natural causes, or from any one of the several causes testified to by medical witnesses in the case, or by reason of the ordinary sickness and vomiting, augmented by the sickness and vomiting of a sea voyage, together with the nervous mental excitement, fatigue, lack of nourishment, and the change of climate, they should find the defendant not guilty, especially where there is evidence to support the theory that death resulted from natural causes.

**HOMICIDE—ABORTION — IMPROPER INSTRUCTIONS.**—In a prosecution for manslaughter, in procuring an abortion, it is re-

versible error, where the defense relies upon the testimony of expert witnesses to show that death resulted from natural causes, to instruct the jury that such testimony is exposed to a reasonable degree of suspicion, and that, in giving too much weight thereto, juries have, in many cases, been induced to render unwarrantable verdicts.

**WITNESSES—EXPERTS—CREDIBILITY.**—An expert witness is to be judged from the same standpoint as any other witness, and credibility is a question for the jury, not for the court. It cannot be assumed, as a matter of law, that expert testimony is open to suspicion for the reason that experts are employed, and are necessarily biased by such employment, or because they differ in their testimony.

**INSTRUCTIONS—CRIMINAL LAW—DEFENDANT NOT TAKING WITNESS STAND.**—It is proper to instruct a jury that unfavorable inferences are not to be predicated upon the fact that the defendant, in a criminal case, did not take the witness stand.

Information for manslaughter. The defendant was convicted and appealed on exceptions taken, before judgment, in a recorder's court.

Fred H. Warren and Levi J. Fick, for the appellant.

Allan H. Frazer, prosecuting attorney, and Ormond F. Hunt, assistant prosecuting attorney, for the people.

**350** McGRATH, C. J. Respondent was informed against, jointly with one Alice Lane, under 2 Howell's Statutes, section 9107, for manslaughter. He demanded and had a separate trial. The first count charged the use of drugs, the name and component parts of which are unknown, the second charged the use of an instrument, the name of which is unknown, and the third charged the employment of means, the nature of which is unknown.

The testimony for the people tended to show that Emily Hall went to the house of Alice Lane about midnight of January 23, 1895; that on Tuesday, January 29th, she was delivered of a foetus four to six months gone; that on Sunday, February 3d, she died; that her body was removed at midnight, Sunday night, to an undertaker's; that it was then placed on the cooling board and embalmed; that the body was not buried, but remained at the undertaker's for over two months; that a reporter for one of the daily papers discovered its presence there, the attention of the authorities was called to it, and on April 15th a coroner's inquest was held, resulting in the arrest of the parties charged. The testimony further tended to show that Emily Hall came from England; that she came to Detroit upon a prearrangement made by one Jonathan Bell; that upon her arrival in Detroit she went direct to the Lane house; that Dr. Seaman was informed of her arrival on Friday, January 25th; that he visited her from time to time until her death; that he was present from 9 o'clock



in the morning on Sunday, February 3d, until after her death; that he went personally to the undertaker's office, and arranged for her burial; that he accompanied the undertaker to the house, obtained the body by way of the alley in the rear of the house, and returned with the undertaker and the body to the undertaker's place of business; that he made out and gave to the undertaker the required death certificate, which gave the name of decedent as Myrtle Cook, her birthplace as New York, the cause of her death as pneumonia, <sup>351</sup> the duration of her disease as one week, the place of death as 608 Piquette avenue, ninth ward. Deceased had not been known by anyone at the house or elsewhere by the name given, and she died at 630 Lincoln avenue. That after the discovery of the body at the undertaker's, respondent told two reporters that at 6 o'clock on Sunday evening, February 3d, a strange gentleman called at his office, and requested him to visit a lady who was very sick with pneumonia; that he asked the stranger why he did not call his family physician, and he said he had discharged him; that he finally consented to go; that the stranger called a hack, and he went with him, and found the lady so ill that respondent told the stranger that she would die that night; that the stranger called the next day, and represented that the girl's name was Myrtle Cook, and he signed the certificate of death.

It further appeared that, before the inquest, respondent tried to prevail upon the coroner not to hold an inquest, claiming that it was unnecessary; that at the time of respondent's arrest, there were found secreted upon his person a number of letters from Bell, in England, addressed to Emily Hall, en route to Detroit, and at Detroit; that these letters were in the handwriting of Jonathan Bell; that said Bell had, a short time previously, visited this country, and had spent some time in Detroit. The letters contained explicit directions as to the Lane house, the decedent's condition, referred to an advertisement of the house in one of the Detroit papers, to the fact that deceased could submit to an immediate removal of the child, or could remain there until the natural course of events, to her expenses, and to remittances for the home voyage after the event. One of the letters contained a copy of a letter from Alice Lane, proposing to give board, room, medical attendance, etc., from time of arrival, for fifty dollars. "Adoption fee, if born outside of our hospital, and we take it in, twenty-five dollars cash. We also will treat you, if you are not too far gone, perfectly <sup>352</sup> safe, for the same money. Will only require you here about ten days for the treatment." It also appeared that, after the death, a letter came to the Lane



house, addressed to Emily Hall, inclosing a draft payable to the latter's order; that this draft was taken to respondent, and he indorsed the name of "E. Hall" thereupon, and the Lanes obtained the money thereon, and, by arrangement in which respondent took part, a messenger was sent to Buffalo to send from there a cablegram to Bell in England, and such cablegram was sent; that before the coroner's inquest, a written statement was prepared by respondent, giving a theory of Emily Hall's appearance at the Lane house, setting forth that she came there before the holidays, and that the child was born alive, and was given to one of the inmates of the house; that this statement was submitted to Alice Lane, Herman B. Lane, and Rose Ryan (the latter, one of the inmates of the Lane household), as the story which was to be told at the inquest, and the suggestions were followed out.

At the inquest, respondent was sworn, and testified that he first saw Myrtle Cook some time before Christmas at his office; that she then told him she was pregnant; that she asked him if he could refer her to some place where she could be kept; that he asked her how much money she had, and, on learning the amount, he told her that the sum was insufficient; that he asked her to call again; that in the mean time he saw Mrs. Lane, and when the patient called he directed her to Mrs. Lane's; that he did not see her again till January 6th, when he was telephoned for and visited her, delivering her of a full grown nine-months child; that he called three successive days afterward, and left her doing well; that about ten days afterward he was again telephoned, and went up, and found that she had a light attack of grippe; that he did not call again for some days, but was sent for a few days before she died, and continued to attend her until her death, which was caused by pneumonia and heart <sup>353</sup> failure. On being questioned relative to his statements made to the reporters, he said:

"The reporter Schmedding was the first. I don't know him. He wore glasses. Came and asked me some questions. I told him what I felt like telling him. I told him lies, because it was none of his business. I told the officers the same as I told him. I thought it was none of their business, and nobody's business.

"Q. The officers of the law, who are here to protect the lives and property of the people—it was none of their business? A. Certainly not. No one could compel me to tell them.

"Q. How did you come to put 608 Piquette avenue on there? A. At Mrs. Lane's suggestion. I asked what the alley behind the house was—about opposite what number it would come—and

she said 608 would be about, and we just guessed at it. I knew this place was not 608 Piquette avenue. I knew it was false when I signed it. I filed it in the health office, and it was accepted. They didn't know the difference, so far as I knew. Myrtle Cook didn't tell me she was thirty-one years old. We just made a guess about that; at least, I think it was a guess. I didn't say she came to my office the day before Christmas; it was some time before Christmas, and this was the first I ever saw of her. I know nothing about her relatives or friends, and have learned nothing since. Somebody—I think it was Mrs. Lane—told me she had been at Bay City. I put down place of birth of deceased, New York, because I didn't know what else to put down. I don't know how the ninth ward came in there. That is a clerical error.

“Q. Wouldn't that help to deceive still more? A. Why, no, if they were very cute in the health office. I gave the officers a bluff answer as to where this place was. I didn't tell them whether it was east or west. I didn't because I didn't know. I did give the reporter a stiff about going out in a coupé, and I didn't know where I was going.

“Q. Didn't you say they had their family physician, and you only went up there— <sup>354</sup> A. (interrupting). I admit the whole thing on that occasion was a stiff and a bluff. I had a right to bluff them, if I felt so inclined.

“Q. Do you think you have the right to make a false report to the health office of the city? A. Certainly, I knew it.

“Q. You think you had the right to make a false certificate? A. If I wanted to.

“Q. Didn't you tell Officer Lally you got this number 608 from the man that came there? A. That is right, but that has nothing to do with it. The question now is different. I had no right to tell professionally, but, since they have told, I have a right to.

“Q. When did you begin telling the truth? A. I told the truth when I went to see Captain Baker; not before. That was last Tuesday afternoon. I also told the truth to my attorney, and I am at it now. I wasn't under oath then, you know.

“By Mr. Fick.—Q. What you have said in regard to the misrepresentations you made to the reporter and to Mr. Lally, were they made to conceal anything on your part? A. Not in the least; simply to protect the Lanes. I proposed to maintain it under my professional seal of secrecy as long as I could, and did until the Lanes gave it away. I then was at liberty to give it away.”

A post mortem was held, in which several physicians participated. The examination was directed to the lungs and uterus. All agreed that there was no perceptible laceration of the parts, and no evidence of the use of instruments; that there had been an expulsion of the foetus; that the size of the womb at that time was that of a three or four months' pregnancy; that the process of involution ordinarily begins immediately after the expulsion, but that the contraction is sometimes delayed by after sickness; that a foetus begins to quicken at four or four and a half months, and that a foetus nine and a half inches long would indicate at least five months' growth. One physician was positive that pneumonia was not the cause of death; another thought that he detected evidence of septicaemia; while two others say that, by <sup>355</sup> reason of the condition of the body, it was impossible to say whether either pneumonia or septicaemia was the death cause.

Counsel put to certain of the physicians the following questions:

"Doctor, supposing a young woman, twenty-five or twenty-six years of age, residing in a little hamlet in England, becomes pregnant by her pastor, in whose church she has been an active worker. After discovering her condition, she deems it necessary to leave her own country, and come to a foreign land. She takes second-cabin passage for New York in the month of January. On the passage over she suffers from sickness and nausea, so much so that she is unable to eat, and keeps her berth most all of the time during the trip over. She lands in New York, and takes the train for Detroit, arriving here in the middle of a cold, stormy night. After some little time she finds her way to her place of destination. The next morning, she is up and eats breakfast, but complains of being unwell. For the two days following, her condition does not appear, but after that she develops these symptoms—chills, fever, headache, pains in the limbs—  
A. Let me interrupt. Did you say two days after?

"Q. Two days after the first—within three or four days after her coming. She develops these symptoms—chills and fever, headache, pain in the limbs, and palpitation of the heart. These symptoms continue for a period of two days longer, when she gives birth to a foetus that shows no signs of life. Now, remembering her social condition, her trip across the ocean, the common vomiting of pregnancy augmented by the vomiting and nausea of a sea voyage, nervous and mental excitement consequent upon leaving her own country and coming to a foreign land, her inability to eat, the fatigue of the voyage, going into a strange climate, these symptoms she developed after coming



here, and the premature discharge of the foetus—in the absence of any testimony of a criminal operation for the production of that miscarriage, what would you say was the cause of it?”

One witness answered as follows: “I would say, most decidedly, it was due to those conditions <sup>356</sup> you mentioned. There is no evidence of any instrument?”

“Q. No evidence of any criminal operation. What symptoms would you expect to find in a woman carrying a dead foetus? A. At what time?”

“Q. When she had carried it long enough to develop any symptoms. A. Increased temperature, chills, lassitude, feeling of heaviness, headache, vomiting, weight in the abdomen, sometimes diarrhoea.”

Another witness said: “It might be— It would be caused, of course, by all these symptoms.

“Q. These conditions? A. Yes.

“Q. Might the membrane be ruptured? A. Yes; quite likely.

“Q. Water escape? A. Yes.

“Q. Foetus die? A. Yes.

“Q. How long might she carry it before it is expelled? A. She might carry it quite a while—several weeks. She might not carry it a day.

“Q. The question that I put to you shows the abortion to have taken place on the sixth day after her arrival. With all the conditions, symptoms, etc., of this question, please tell the jury what you think was the cause of the premature birth of the foetus in this case. A. These things would bring on pains, and the pains, of course, would rupture the membrane, and, of course, that would bring on the abortion sooner or later. . . . The symptoms you have described are the ones I would expect to find in a woman carrying a dead foetus.”

Another witness said: “There is certainly a history there sufficient to cause the child’s death, and perhaps the woman’s death, from those conditions.”

One of the people’s witnesses testified that she was in the Lane house at the time, that Emily Hall dropped the <sup>357</sup> foetus in the watercloset bowl, that the witness saw it, and that it was about nine and one-half inches long.

A witness testified that she (witness) gave birth to a child in the Lane house on Tuesday evening, January 22, 1895. Another witness testified that respondent operated upon her with instruments at the Lane house on January 23, 1895, and that she was four months gone at the time. Another witness testified that respondent operated on her at the Lane house in June, 1894, and

took from her a three and one-half months' foetus, and that he operated on her again in October, 1894, at the same place, and took away a foetus six weeks old. It is insisted that the court erred in the admission of the testimony of the last-named three witnesses.

The general rule is, that evidence shall be confined to the issue, and that on a trial for felony the prosecution will not be permitted to give evidence tending to prove the defendant guilty of another distinct and independent felony. There are, however, exceptions to this rule. The other offense may be part of the *res gestae*, or the proof thereof may be admissible to show motive: *People v. Marble*, 38 Mich. 117; *Phillips v. People*, 57 Barb. 353; *State v. Braunschweig*, 38 Mo. 587; *Burr v. Commonwealth*, 4 Gratt. 534; *Heath v. Commonwealth*, 1 Rob. (Va.) 735; *Rex v. Clewes*, 4 Car. & P. 221; *Brown v. Commonwealth*, 76 Pa. St. 319; *Johnson v. State*, 17 Ala. 618; *Commonwealth v. Sturtivant*, 117 Mass. 123; 19 Am. Rep. 401. Where it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent, or, where it is claimed that the thing done was the result of an accident, proof of other like occurrences under like conditions has been held admissible; as where the question is whether a fraud has been perpetrated—for instance, where a vendee of goods is alleged to have procured the sale of goods by misrepresentation: *Kost v. Bender*, 25 Mich. 515; *Beebe v. Knapp*, 28 Mich. 53; *Shipman v. Seymore*, 40 Mich. 275; *Cook v. Perry*, 43 Mich. 623; *Dayton v. Monroe*, 47 Mich. 193; *Dibble v. Nash*, 47 Mich. 589; *Stubly v. Beachboard*, 68 Mich. 401; *Hall v. Naylor*, 18 N. Y. 588; 75 Am. Dec. 269; *Hennequin v. Naylor*, 24 N. Y. 139; *Miller v. Barber*, 66 N. Y. 558; *Blalock v. Randall*, 76 Ill. 224; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Bottomley v. United States*, 1 Story, 135; *United States Life Ins. Co. v. Wright*, 33 Ohio St. 533; or under an indictment for obtaining goods or money by means of false pretenses: *Bielschofsky v. People*, 3 Hun, 40; 60 N. Y. 616; *Mayer v. People*, 80 N. Y. 364; *Weyman v. People*, 4 Hun, 511; *Commonwealth v. Coe*, 115 Mass. 481; *Regina v. Francis*, 22 Week. Rep. 663; 10 Alb. L. J. 120; L. R. 2 C. C. 128; or for knowingly receiving stolen property: *Coleman v. People*, 55 N. Y. 81; *Copperman v. People*, 56 N. Y. 591; *State v. Harrold*, 38 Mo. 496; or for embezzlement: *Regina v. Richardson*, 2 Fost. & F. 343; *Regina v. May*, 1 Cox C. C. 236; *Regina v. Proud, Leigh & C.* 97; or under indictments for uttering counterfeit bills, or having in possession counterfeit money or counterfeiting apparatus,

with intent, etc: *Regina v. Forster*, Dears. C. C. 456; *Rex v. Ball*, 1 Camp. 324; *Regina v. Weeks*, Leigh & C. 18; *Regina v. Zeigert*, 10 Cox C. C. 555; *Commonwealth v. Price*, 10 Gray, 472; 71 Am. Dec. 668; *Commonwealth v. Coe*, 115 Mass. 481. In arson cases, evidence has been admitted as to previous attempts to fire the same building or contiguous buildings, or to show other incendiaries under like circumstances, involving the presence of the prisoner in the locality: *Regina v. Bailey*, 2 Cox C. C. 311; *Regina v. Dosset*, 2 Cox C. C. 243; *Regina v. Taylor*, 5 Cox C. C. 138; *Regina v. Briggs*, 2 Moody & R. 199; *Rex v. Moore*, 2 Car. & P. 235; *Kramer v. Commonwealth*, 87 Pa. St. 299; *Commonwealth v. McCarthy*, 119 Mass. 354; *Commonwealth v. Bradford*, 126 Mass. 42.

Some of these authorities would seem to be border cases, but they illustrate the tendency of the courts to allow the introduction of this class of testimony to repel the inference that the cause was an accidental one, in cases where such an inference might otherwise obtain. Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime <sup>359</sup> charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain: *Regina v. Roden*, 10 Moak, 511; *Regina v. Cotton*, 5 Moak, 479; *Regina v. Geering*, 18 L. J. M. C. 215; *Regina v. Garner*, 3 Fost. & F. 681; *Rex v. Voke*, Russ. & R. 531; *Stout v. People*, 4 Park. C. C. 71; *Osborne v. People*, 2 Park. C. C. 583; *Dunn v. State*, 2 Ark. 229; 35 Am. Dec. 54; *Pierson v. People*, 18 Hun, 239; *State v. Watkins*, 9 Conn. 47; 21 Am. Dec. 712; *Commonwealth v. Blair*, 126 Mass. 40; *Commonwealth v. Corkin*, 136 Mass. 429; *Weed v. People*, 56 N. Y. 628; *Hays v. State*, 40 Md. 633; *Regina v. Dale*, 16 Cox C. C. 703.

In Wharton's American Criminal Law, sixth edition, section 649, it is said: "Where the scienter or quo animo is requisite to, and constitutes a necessary and essential part of, the crime for which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime."



And 3 Greenleaf on Evidence, section 15, has the following: "In the proof of intention, it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent proved to have existed in other transactions, done before or after that time."

And in Stephen's Digest of Evidence, article 11 (7 Am. & Eng. Ency. of Law, 61), the rule is laid down as follows: <sup>360</sup> "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is deemed to be relevant to the issue."

And in article 12 (7 Am. & Eng. Ency. of Law, 62), the same author says: "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant": See, also, 1 Greenleaf on Evidence, section 53, and notes.

In *Regina v. Roden*, 10 Moak, 511, a mother was charged with the murder of her infant by suffocation, and it was held admissible to show the death of her other children under similar circumstances.

On the trial of a wife for poisoning her husband with arsenic, proof of the subsequent death of her two sons from arsenical poisoning was admitted, with a view of enabling the jury to determine whether the taking of the poison was accidental or not: *Regina v. Geering*, 18 L. J. M. C. 215.

In *Regina v. Garner*, 3 Fost. & F. 681, on the trial of a man and his wife for the murder of his mother by poison, the wife having been a servant in the family during the life of a former wife, evidence was admitted of the circumstances under which the former wife had died from poison.

In *Rex v. Voke*, Russ. & R. 531, upon an indictment for maliciously shooting, held that, if it be questionable whether the shooting was by accident or design, proof may be given that the respondent at another time intentionally shot at the same person.

In *Commonwealth v. Corkin*, 136 Mass. 429, respondent was charged with using an instrument upon the body of a woman with intent to procure a miscarriage. Evidence that on subsequent occasions, within ten days, defendant administered the

same <sup>361</sup> treatment, was held admissible for the purpose of showing intent, and respondent's knowledge of the condition of the woman. The court say: "Whether it was of acts which formed part of the principal transaction, or of acts of the defendant at other times, it tended to prove attempts of the defendant to procure the identical result charged; that is, to prove the intent which was charged in the indictment. Being competent to prove the crime charged, it is no objection that it also tended to prove other crimes."

In *Weed v. People*, 56 N. Y. 628, respondent was indicted for procuring an abortion; and a circular introduced in evidence, which was issued and circulated by the accused, advertising that he could be consulted, and advising females who should consult him how the same could be kept secret and they protected from criminal punishment, was held admissible as tending to show knowledge on the part of defendant of the character of the drugs administered, and their probable effect, and that he administered them for the purpose of procuring an abortion.

In *Hays v. State*, 40 Md. 633, where parties were charged with producing an abortion, it was held proper to show the character of the house—that it was a house of ill-fame.

In *Commonwealth v. Blair*, 126 Mass. 40, on the trial of an indictment for procuring an abortion, evidence that, five months before the time of the alleged operation, defendant had in his possession an instrument which he described as well fitted to procure an abortion, was held admissible as tending to show that defendant was in possession of the means of committing the crime.

In the case of *Rosenweig v. People*, 63 Barb. 634, defendant was charged with procuring an abortion upon B. He testified in his own behalf, and on cross-examination W. was pointed out to him, and he was asked if he knew her, and he stated that he did not, and had never seen her. He was then asked if he had not procured an abortion upon W., and answered that he had not. It was held that it <sup>362</sup> was not competent to impeach the prisoner as a witness by contradicting him as to facts disconnected with or collateral to the subject matter at issue and on trial.

In *Baker v. People*, 105 Ill. 452, two persons were on trial for the offense; and it was held that the people should have been put to their election whether they would proceed against defendant B. alone for using the wire, or against both for what occurred at the house of defendant G. Under the statute of that state, intent is not made an ingredient of the offense, and in this respect the case is similar to *Albricht v. State*, 6 Wis. 74.

Our own state has frequently recognized the rule that, where

it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent: *Carver v. People*, 39 Mich. 786; *People v. Marble*, 38 Mich. 117; *People v. Henssler*, 48 Mich. 49; *People v. Wakely*, 62 Mich. 297; *People v. Hawkins*, 106 Mich. 479.

The case of *People v. Sessions*, 58 Mich. 594, to which our attention is not called by the briefs of counsel, is directly in point. Respondent was charged with the death of Mrs. Peck, resulting from abortion performed by her. "The testimony of four of the people's witnesses relating to respondents' possession of instruments to produce an abortion, and her use of them, and her knowledge upon the subject, and that she held herself out for the performance of such service with the instruments, for hire, was given on the part of the prosecution. It consisted of conversations of respondent had with these four persons, extending through a period of four years previous to the death of Mrs. Peck, wherein the respondent stated to one that she had the instruments with which to perform abortion, had herself got rid of a number of children, and showed her the instruments, at the same time saying to the witness, if she wanted any help, she could help her. To another she stated that she had committed abortions, 363 and she could do it again; that she had the instruments to use in doing it. To another she stated her terms for performing such service, which she then proffered to the witness, who was in the family way, and told her she had the instruments for the purpose." The testimony was offered to show guilty knowledge and intent, and the possession of the necessary means to accomplish the act, and it was held competent.

Miscarriages do occur from accidental causes. Death follows, not only in cases of miscarriage and premature birth, but also in ripe cases of childbirth. Physicians are necessarily in attendance in such cases. Respondent had, at the coroner's inquest, testified that this was a case of childbirth, and subsequent death from pneumonia. He stated that he was called to the house, professionally, to attend a woman in confinement. It became necessary to show guilty knowledge and intent on his part. How else could the prosecution prove the *quo animo*—the criminal purpose of his attendance—except by showing the character of the place, the fact that it was a place of resort for such practices, and that respondent was frequently there, and for the very purpose of performing his part in these criminal operations? Unless indirect proof of guilty knowledge is admitted, it would be impossible, in many cases, to prove this essential element in



the offense. As is said by Heath, J., in *Whiley's case*, 2 Leach, 986: "The charge puts in proof the knowledge of the prisoner, and, as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances."

It is urged that the court erred in not compelling the prosecution to elect upon which count of the information the people relied. That election was made upon submission of the case to the jury.

The showing made entitled the people to have the name of the witness Greusel indorsed upon the information.

Herman B. Lane was not the husband of the co-respondent, <sup>364</sup> Alice Lane. A marriage contract, without ceremony, cannot be valid under circumstances in which a ceremonial marriage would be unlawful.

The court did not err in admitting evidence of the delivery of the registered letter to Mrs. Lane, or of its contents, the money order, or of the indorsement made thereon by defendant, or of the cashing of the order, or in admitting the order itself. Respondent was connected with the letter and order. It was competent to show that he knew decedent's name, and where she came from, and that the statements made in the death certificate used at the coroner's inquest were knowingly false.

The cablegram was without the jurisdiction of the court, an effort was made to obtain it, and the parol evidence was admissible to show its nature.

There is no force in the contention that the evidence was insufficient to warrant a finding that Emily Hall was pregnant when respondent treated her, that the foetus was quick, that an abortion had been performed, and that death ensued in consequence. We are compelled, however, to reverse the case on other grounds.

Counsel for defendant requested the court to instruct the jury that: "If the jury believes that Emily Hall aborted from natural causes, or from any one of the several causes testified to by the medical witnesses in the case, then you should find the respondent not guilty. If the jury believes that Emily Hall aborted by reason of the ordinary sickness and vomiting, augmented by the sickness and vomiting of a sea voyage, together with the nervous, mental excitement, fatigue, lack of nourishment, and the change of climate, then you should find the respondent not guilty."

These requests should have been given. The testimony tending to prove the body of the crime was circumstantial. <sup>365</sup> The theory of the defense was that death resulted from natural causes.

That theory should have been submitted to the jury: *People v. Cummins*, 47 Mich. 334.

The court instructed the jury that: "Some expert testimony has been given in this case, but its value depends upon the circumstances, and of these circumstances the jury must be the judges. The jury must determine the weight to be credited to it, but in all cases the testimony of experts is to be received and weighed with great caution. The evidence of a witness who is brought upon the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is in many instances the result of employment and his bias arising out of it. In many cases, it is to be feared, by giving too much weight to testimony of experts, juries have been induced to render unwarrantable verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to public interests."

This instruction was clearly erroneous. An expert witness is to be judged from the same standpoint as any other witness: *Turnbull v. Richardson*, 69 Mich. 400; *People v. Vanderhoof*, 71 Mich. 158. It was for the jury, and not for the court, to determine the weight to be given to the testimony: *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276. As has already been said, the evidence as to the death cause was circumstantial. An autopsy had been held for the very purpose of determining the cause. Two experts had been called by the people to testify as to the result of that examination, and it must be conceded that these witnesses were better qualified to determine what symptoms usually precede a miscarriage, and what are the ordinary causes which produce it, and what the condition of the body indicated upon the examination made, than is the ordinary layman. In *People v. Millard*, 53 Mich. 63, it is said that: "Upon medical questions, while persons may testify whose knowledge is chiefly theoretical, there can be no question of the superior value of practical knowledge, <sup>300</sup> combined with theoretical, especially on such matters as involve the interpretation of symptoms and actions of the sick."

Expert testimony is not always the most reliable, but it is often indispensable. Its infirmity arises largely from its character. Comparatively, it has been held to have little value: *Treat v. Bates*, 27 Mich. 390; *Viets v. Toledo etc. Ry. Co.*, 55 Mich. 120; *Stone v. Chicago etc. Ry. Co.*, 66 Mich. 76. Suppose that these witnesses had found evidences of a criminal operation upon the body, or suppose that some of them had so testified, and that others had said otherwise; would the court have been justified in

giving the instruction here complained of? It does not follow, because experts differ, that the testimony should be said to be suspicious. Lay witnesses differ materially in their testimony as to conversations and occurrences. Judges, lawyers, and juries differ in their constructions from a given state of facts. It cannot be assumed, as a matter of law, that this class of testimony is open to suspicion, for the reason that experts are employed, and are necessarily biased by such employment. The other circumstances of the case bearing upon the death cause and defendant's guilt were for the jury, and it was their province to determine those questions from all the facts and circumstances, and to disregard the opinion evidence as to the cause of death, if, in their judgment, the other testimony warranted that conclusion.

The court very properly instructed the jury that unfavorable inferences were not to be predicated upon the fact that defendant did not take the witness stand, and we think that the remarks made by the prosecuting officers would not have been open to criticism if those officers had observed that rule.

For the errors referred to, the verdict must be set aside, and a new trial awarded.

The other justices concurred.

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**CRIMINAL LAW—EVIDENCE OF LIKE OFFENSES.**—In a criminal prosecution, evidence of another offense than the one charged is admissible to show motive, interest, or guilty knowledge: Note to *State v. Reed*, 42 Am. St. Rep. 333. See, also, note to *Porath v. State*, 48 Am. St. Rep. 961.

**ABORTION—HOMICIDE—EVIDENCE OF OTHER ABORTIONS—INTENT.**—On a trial for committing an abortion causing death, evidence extending over a period of four years, to the effect that the accused stated that she had committed abortions, and could do it again, and that she had the instruments, is admissible on the question of knowledge and intent: See monographic note to *State v. Moore*, 95 Am. Dec. 786, on homicide caused by the death of the mother resulting from an attempt to procure an abortion upon her. Criminal intent to procure an abortion is sufficient to constitute the crime of procuring an abortion, though the means employed are inadequate: See monographic note to *Abrams v. Foshee*, 66 Am. Dec. 86, on the crime of causing an abortion.

**EVIDENCE—SECONDARY—INSTRUMENT BEYOND JURISDICTION.**—The contents of a paper which is beyond the jurisdiction of the court may be proved by secondary evidence: Note to *Bishop v. American Preservers' Co.*, 48 Am. St. Rep. 340.

**WITNESSES—EXPERTS—CREDIBILITY—WEIGHT.**—In an ordinary case it is error to instruct the jury that medical testimony should be received and weighed with caution. Expert testimony is to be received and weighed by the jury precisely as other testimony: *Louisville etc. Ry. Co. v. Whitehead*, 71 Miss. 451; 42 Am. St. Rep. 472, and note.



## CASE v. SMITH.

[107 MICHIGAN, 416.]

**SEDUCTION—ALIENATION OF AFFECTIONS—AFFIANCED HUSBAND'S RIGHT OF ACTION.**—An affianced husband has no right of action for the seduction or the alienation of the affections of his betrothed wife.

**NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION.**—There being no liability on the part of one who seduces an affianced husband's betrothed, and who alienates her affections, a promissory note given by him to such husband for the purpose of keeping the matter quiet is void for want of consideration.

**CONTRACTS—VOID IN PART VOID IN TOTO.**—If any part of an indivisible promise or any part of an indivisible consideration for a promise is illegal, the whole is void, and no action can be maintained thereon.

**NEGOTIABLE INSTRUMENTS—WHEN VOID AS AGAINST PUBLIC POLICY.**—If the consideration for a promissory note consists in part of an agreement to conceal from the public and from the maker's wife the fact that he has been guilty of adultery, the note is void as against public policy.

Assumpsit by Edgar D. Case against Eli T. Smith upon a promissory note. The plaintiff appealed from a judgment on demurrer for the defendant.

Tinker & Frackleton, for the appellant.

Ed. S. Lee and Durand & Carton, for the appellee.

**416** McGRATH, C. J. Suit is brought upon a non-negotiable promissory note, which omitted the "for value received" clause. Plaintiff declared on the common counts, and in four special counts sets up: **417** 1. That plaintiff had been for some time engaged to be married to a widow named D.; that November 10, 1892, he visited D., and found defendant concealed in the house; that defendant was at the house for the purpose of having carnal intercourse with said D., and in consequence plaintiff suffered great mental and physical anguish; 2. That prior to that time defendant had betrayed, seduced, and debauched said D., with full knowledge that she was the betrothed wife of plaintiff, to plaintiff's damage; 3. That defendant had also endeavored to alienate the affections of said D. from plaintiff; 4. That after the discovery of defendant's intimacy with said D., defendant came to plaintiff, and requested plaintiff to keep the matter quiet, and agreed that if plaintiff would continue to keep company with said D., and would refrain from telling the people of that locality of the intimacy existing or that had existed between defendant and said D., viz., the seduction, debauching, and sexual intercourse aforesaid, defendant would recompense him well

for the same; that in consideration of plaintiff's agreeing so to do, defendant executed and delivered to plaintiff the note in question; that plaintiff did as he agreed, and publicly kept company with said D., and did refrain from informing the public of the intimacy that had existed between defendant and said D; that said note was expressly given and accepted with the agreement that defendant was to pay the same in consideration of plaintiff's keeping company with said D., and refraining from exposing to said defendant's wife the criminal proceedings and actions aforesaid; that plaintiff has performed the agreement on his part, but defendant has failed so to do.

A bill of particulars was demanded under the common counts, and furnished, which contained the following items: "For damages in alienating the affections of Mary B. Davison from plaintiff, \$5,000; for damages in seducing, debauching, and having carnal intercourse with Mary B. Davison, the betrothed wife of plaintiff, \$5,000; <sup>418</sup> for failure of defendant to keep his agreement with plaintiff, and in failing to pay the note set forth in plaintiff's declaration, \$5,000."

The case comes here on appeal from an order sustaining a demurrer to said declaration, and judgment accordingly.

A civil action for the alleged seduction of D. could only be brought by the woman herself, or by her father, guardian, or some relative. A betrothed person has no right of action for the seduction or the alienation of the affections of his affianced: Cooley on Torts, 236. In *Swanson v. Griffin*, 68 Miss. 319, cited by appellant, defendant had seduced plaintiff's infant unmarried daughter, and she had given birth to a child. In *Brannum v. O'Connor*, 77 Iowa, 632, also cited by appellant, plaintiff had married defendant's foster daughter, and afterward learned that she was pregnant at the time of the marriage, by her foster father. Plaintiff agreed to continue to live with the woman and maintain the child. The court held that, under the code, the pregnancy of the woman at the time of her marriage was a cause for divorce, and that plaintiff was under no obligation to live with the woman or maintain the child. In *Loomis v. Cline*, 4 Barb. 453, the maker of the note had assaulted plaintiff's daughter, with intent to commit a rape. The court held that, from his paternal relation alone, plaintiff had no authority to commence an action for his daughter; that he could not release or compromise such claim, and, if she had a right of action, it remained unaffected by that agreement; and that the note was without consideration: Citing *Fonda v. Van Horne*, 16 Wend. 631; 30 Am. Dec. 77; *Hunter v. Westbrook*, 2 Car. & P. 578; *Macpherson on Infants*, 352; 41

Law Lib. 228. Defendant was not liable to respond in damages to plaintiff by reason of the matters set forth in the first three special counts of the declaration, or the first two items of plaintiff's bill of particulars, <sup>419</sup> and, in the absence of such liability, there was no consideration for the note.

As to the contract set up in the fourth count, plaintiff's agreement was in part to conceal from the public and from defendant's wife the fact that defendant had been guilty of a crime. It is well settled that any contract, the consideration of which is to conceal a crime or stifle a prosecution, is necessarily repugnant to public policy, and that a contract whose consideration is contrary to public policy is void: 2 Kent's Commentaries, 466; 2 Starkie on Evidence, 49; Roll v. Raguet, 4 Ohio, 400; 22 Am. Dec. 759; Clark v. Ricker, 14 N. H. 44; Treat v. Jones, 28 Conn. 334. It is equally true that if any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained thereon: Snyder v. Willey, 33 Mich. 483, and cases cited at page 495.

The judgment is affirmed.

Grant, Montgomery, and Hooker, JJ., concurred.

Long, J., did not sit.

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CONTRACTS—CONSIDERATION—WHEN VOID.—An entire contract is void if founded upon an indivisible consideration part of which is illegal: Note to Edwards v. Randle, 58 Am. St. Rep. 111. Illegal contracts are void in toto. If part of the consideration is illegal, the whole contract is void as against public policy: Note to Handy v. St. Paul etc. Pub. Co., 16 Am. St. Rep. 699.

NEGOTIABLE INSTRUMENTS—VOID AS AGAINST PUBLIC POLICY.—A promissory note, the consideration for which is an agreement not to prosecute the maker for a felony, is against public policy, and therefore void: Roll v. Raguet, 4 Ohio, 400; 22 Am. Dec. 759.



## KUZNIAK v. KOZMINSKI.

[107 MICHIGAN, 444.]

**NUISANCE—USEFUL BUILDING WHICH SHUTS OFF LIGHT.**—One has a right to erect a building for a useful purpose anywhere on his premises, such as a wood and coal house, and, though he maliciously places it within a few feet of his neighbor's tenement house in such a way as to shut off some of the light, it is not a nuisance.

Bill by John Kuzniak against Jacob Kozminski and Francis Kozminski to abate an alleged nuisance. The defendants appealed from a decree for the complainant.

Thompson & Temple, for the appellants.

James E. McBride, for the appellee.

**444 LONG, J.** The parties to this cause own adjoining lots in the city of Grand Rapids. Defendant's lot is on the **445** southeasterly corner of Eleventh and Muskegon streets, and upon which is a large tenement house facing both streets. The complainant owns the lot immediately south and adjoining the defendants, and upon which he has a dwelling-house facing Muskegon street, and also a tenement house about sixty feet back from Muskegon street, and within twenty-two inches of the north line, being the line of defendants' lot. At the time this tenement house was erected, defendants had upon their lot what was called a "chicken shed"; and, after complainant's tenement house was erected, defendants moved this chicken shed upon a part of their lot directly opposite complainant's tenement house, and within twenty-four inches of the lot line, and converted it into a coal and wood house for the use of their tenants, who occupied the dwelling on said lot. This bill was filed by complainant for the purpose of having this coal and wood house of defendants declared a nuisance, and to compel them to remove the same. The claim made by the bill is, that the defendants removed the building to that place through spite and from a malicious motive, and not because it was needed for any useful purpose. Defendants answered the bill, denying that they were actuated by malice in putting the building there, and averred that it was so placed for the use of their tenants for wood and coal. The testimony was taken in open court, and the court found that the building was a nuisance, and a decree was entered directing the defendants to remove the building within sixty days from the date of the decree, and that, in default of such removal, the sheriff of the county remove the same, at the cost and expense of defendants

The complainant was awarded the costs of the suit. Defendants appeal.

It was held in *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, and the decree of the court below ordering its removal was affirmed; but that decision was <sup>446</sup> placed on the ground that the fence served no useful purpose, and was erected solely from a malicious motive. In the present case, the building erected by the defendants was for a useful purpose; and, while there may have been some malice displayed in putting it so near the complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed. Defendants had a right to erect a building upon their own premises, and the decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form the basis upon which to found a remedy. In *Allen v. Kinyon*, 41 Mich. 282, it was held that the motive is of no consequence when the party does not violate the rights of another. In *Hawkins v. Sanders*, 45 Mich. 491, it was held that there was no right of prospect which would prevent the erection of an awning on a neighboring lot. The case does not fall within the rule of *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510, and the court below was in error in directing the removal of the building. That decree must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts to the defendants.

The other justices concurred.

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**NUISANCE—BUILDINGS.**—An owner of land may lawfully erect small and cheap movable tenement houses thereon close to the line of an adjacent owner, to be let to orderly colored tenants, though the act is done with malice: Note to *Flaherty v. Moran*, 21 Am. St. Rep. 512.

## NEWBERRY v. CARPENTER.

[107 MICHIGAN, 567.]

**CONSTITUTIONAL LAW—SEIZURE OF PRIVATE PROPERTY FOR EVIDENCE IN CRIMINAL CASES.**—A court has no power to direct officers of the law to enter the private inclosure of a person and there seize his lawful property, to be held as evidence against an alleged criminal. Such a seizure is unwarranted and unreasonable, and is prohibited by both the state and national constitutions. Hence, such officers cannot be authorized to enter a private inclosure and to take from the owner's possession a wrecked boiler and its appurtenances for use as exhibits upon the trial of another person for manslaughter, where death resulted from the latter's criminal negligence, as engineer, in causing the explosion of the boiler.

Mandamus by Helen H. Newberry, trustee, to compel William H. Carpenter, circuit judge, to vacate an order impounding certain property owned by the relator, for use as exhibits in a criminal case.

Wells, Angell, Boynton & McMillan, and Otto Kirchner, for the relator.

Allan H. Frazer, prosecuting attorney, Ormund H. Hunt, assistant prosecuting attorney, and John G. Hawley, for the respondent.

**568 GRANT, J.** The facts in this case are as follows: The relator was the owner of a large building in the city of Detroit, occupied by a printing establishment and other business enterprises. A large number of persons were employed in it. A steam-engine and boilers were used in heating the building, and situated in the basement. On November 6, 1895, one or both of the boilers exploded, completely wrecking the building, causing the death of thirty-seven persons, and injury to others. It was claimed by the prosecutor of the county that one Thompson, the engineer, caused the explosion by his criminal negligence in the management of the engine and boilers, and was therefore guilty of manslaughter. An indictment was promptly returned by the grand jury against him, charging him with the crime. Immediately after the explosion, the police department of the city of Detroit took possession of the building, and removed the debris and the bodies of those killed.

On November 16th, the prosecuting attorney appeared before one of the circuit judges of the county of Wayne, and upon his verbal statement, without any sworn petition or affidavit, the fol-



lowing order was made: "On motion of O. F. Hunt, assistant prosecuting attorney, and after hearing argument of H. E. Boynton and Otto Kirchner, friends of the court therein, it is ordered that the steam-engine, boiler or boilers, and materials surrounding the same, and now upon the premises known as 45 and 47 Larned street, west, be, and the same are, ordered into the custody of the police department of the city of Detroit, as exhibits in said cause; the same, however, not to be removed from said premises. This order to remain in force only until the decision of a motion for injunction now pending before Judge Lillibridge, and subject to the terms of an order this day made by him."

The relator moved to vacate this order, which the court refused, and the object of this proceeding is to set aside that order.

<sup>569</sup> Upon the hearing of this motion, the prosecutor filed an affidavit, from which it appears that, after the police department took possession of the debris, an arrangement was made between him and Mr. Thompson, through his attorney, and the relator, that certain persons (expert engineers) should, on behalf of the respective parties, have free access to the engines, boilers, machines, and the premises, for the purposes of examination. The learned prosecutor further states in his affidavit that this property is essential to be used as exhibits upon the trial of Mr. Thompson, as well as for the further investigation into the causes of the disaster by the grand jury, and claims the right of the prosecution to hold them until all criminal cases connected with the disaster are tried. It thus appears that the prosecution had the entire control and charge of this property for a period of ten days prior to the making of this order, and have had ample opportunity for an examination thereof by the officers and experts to determine the cause of the disaster, so far as it can be determined from these articles.

The importance of this case to the relator is apparent from the statement of her counsel in their brief that she is threatened with civil suits for damages upon the ground that she was guilty of negligence. Not only, therefore, is she by this order deprived of her private property, which she may desire to use in her business, but may be deprived of the evidence which may establish her innocence of any fault. She is charged with no crime. The broad claim of the learned prosecutor is that the courts possess the power, upon his motion, to enter upon the premises of private persons, and seize any property which may, in his judgment, have any bearing upon a crime with which another is charged. If the order in this case be sustained, it results in holding that a citizen's team, with which he earns a livelihood, may be seized by

the police authorities because the prosecutor believes that such team was used by an alleged criminal <sup>570</sup> in the commission of a crime. If A be arrested, charged with arson in the burning of B's house, and there be some evidence in the house believed to connect A with the crime, the police authorities may seize and hold possession of the house for months, and until the trial, and prevent the owner from rebuilding. So, under like circumstances, a manufacturer might be deprived of the possession of his property necessary for the successful carrying on of his business. Other illustrations will readily suggest themselves. The power is certainly an extraordinary one, and those who assert it ought to be able to find some common or statute law authorizing it. The exercise of power no more arbitrary than this has caused revolutions.

The learned prosecutor cites the following authorities in support of his contention: Wharton's Criminal Pleading and Practice, sec. 60; 1 Bishop's New Criminal Procedure, secs. 210, 211; *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23; *Woolfolk v. State*, 81 Ga. 551; *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68; *O'Connor v. Bucklin*, 59 N. H. 589. These authorities do not even hint at such an arbitrary and broad power. The citation in Wharton says only that "those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged." The citation from Bishop goes no further. In *Ex parte Hurn*, 92 Ala. 102, 25 Am. St. Rep. 23, money was taken from the possession of the prisoner, and delivered to the sheriff, who was afterward served with a writ of garnishment at the suit of an attaching creditor of the prisoner. The sheriff paid the money into court, and asked instructions as to what he should do with it, while the prisoner asked an order for its restoration to himself. It was held that the case could not be reviewed upon mandamus. Many cases are cited and reviewed in that decision, none of which sustain the present case. That court quotes with approval the case of *Boyd v. United States*, 116 U. S. 616, hereinafter referred to. The conclusion of the court in that case is, that <sup>571</sup> "it is the duty of an officer, having no other authority than the right to make the arrest, to search the party arrested, and seize and remove from him any dangerous weapon found on his person." That authority is confined by the decision to the seizure of articles found upon the person, and connected with the offense. In *Woolfolk v. State*, 81 Ga. 564, the respondent was charged with murder. During the progress of the inquest he was required to remove his clothing, and while so doing he made

statements which were introduced upon the trial. It was objected that the circumstances surrounding the defendant amounted to force and compulsion, but the testimony was held proper. In deciding that case the court discusses the right of seizure, and speaks only of seizure from the person. In *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68, a large number of pieces of German silver, of the precise size and thickness of Mexican dollars, and made in that form for the purpose of being stamped and milled into counterfeit coin of that description, were taken by a sheriff from the person who was carrying them at the time to a place of manufacture, for the purpose of having them finished, so that he could put them in circulation as genuine coin, and were detained by the sheriff to be used as evidence against the person from whom they were taken, and also for the purpose of preventing their circulation. These were material to be used in counterfeiting. It was held that "the owner of them, in the absence of evidence that they were put in that form without his knowledge or against his consent, could not sustain trover against the sheriff therefor." *O'Connor v. Bucklin*, 59 N. H. 589, is another case of taking property found upon the person of the party accused.

In my judgment, no case cited in the opinion of my brother, the chief justice, sustains the power here asserted. In *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459, the property was taken from the person of the respondent, and was levied upon by attaching creditors while in the <sup>572</sup> hands of the sheriff. The decision quotes the statute of that state authorizing search and seizure, and maintains the right of the officer to take weapons from the prisoner, and also money or other articles of value found upon him, by means of which, if left in his possession, he might procure his escape. *Commercial Exchange Bank v. McLeod*, 65 Iowa, 665, 54 Am. Rep. 36, is a similar case, where the property of the prisoner, taken from his person upon arrest, was attached in the hands of the officer. In *Langdon v. People*, 133 Ill. 382, the property seized was a forged official certificate. It was held not to be private property, and was seized upon a search warrant made upon due complaint.

In the case of *Boyd v. United States*, 116 U. S. 616, Mr. Justice Bradley, in delivering the opinion of the court, quotes with approval the language of Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029: "No man can set his foot upon my ground without my license, but he is liable to an action, though the dam-



age be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass, and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment." The right of search and seizure is very fully and ably discussed in the *Boyd* case, at page 622 et seq.

In *Hibbard v. People*, 4 Mich. 125, an act to authorize the issue of a warrant to seize liquor, and retain it to abide the order of the court, to be used in evidence upon a trial, was held to be unconstitutional. This decision was approved in *Robison v. Miner*, 68 Mich. 557.

573 The people of this state, through their legislature, have made ample provisions for the seizure of property in criminal cases, and they are summarized as follows: 1. Personal property stolen, embezzled, or obtained by false pretenses; 2. Counterfeit or spurious coin, forged bank notes, or other forged instruments, or any tools, machines, or other materials provided or prepared for making them; 3. Obscene matter; 4. Lottery tickets; 5. Gaming apparatus. Section 9619 of 2 Howell's Statutes provides what shall be done with the articles so seized. These statutes are declaratory of the legislative will upon the subject of search and seizure, and cannot be extended by the courts to include the right to enter the inclosures of private citizens, and seize their lawful property, to be held as evidence against alleged criminals. No intimation is found in any statute of this state, or in any decision of this court, that a prosecutor may cause to be seized the property of third parties, the possession, ownership, and use of which are not prohibited by law, and which are useful and required in the legitimate prosecution of their businesses, and their private inclosures to be entered for that purpose. Such seizures are unwarranted, unreasonable, and prohibited by the constitution of the United States and of this state. Important as is the proper administration of the criminal law, the power to administer must be exercised with due regard to the constitutional rights of the citizen, among which is the right to the possession and control of his lawful property. Justice Cooley says: "The only lawful mode

of making search upon one's premises is under the command of search warrants, and these are allowed to discover stolen or smuggled goods, or implements of gaming, and in a few other cases, for which provision must be found in the statutes. The authority to issue them is liable to great abuses, and the law is justly strict regarding their requirements": Cooley on Torts, 295. <sup>574</sup> See, also, Cooley's Constitutional Limitations, 6th ed., 364-370; 2 Hare's Constitutional Law, 830; Potter v. Beal, 49 Fed. Rep. 793.

The order of the circuit judge was without authority of law, and must be set aside. The writ will issue.

Long, Montgomery, and Hooker, JJ., concurred with Grant, J.

McGRATH, C. J., DISSENTED, as follows: "On the sixth day of November, 1895, a boiler situate upon relator's premises, in the city of Detroit, exploded, killing thirty-seven persons. At the time of the explosion a grand jury was in session, and after the explosion said grand jury brought into the circuit court for the county of Wayne an indictment against one Thompson, who was the engineer employed by relator, and in charge of the boiler in question at the time of the explosion, charging said Thompson with manslaughter. The circuit judge, upon application of the prosecuting officers, after hearing counsel for said Thompson, and also counsel for relator, directed the police department to take the said boiler and attachments into custody, as exhibits in said matter. Relator afterward moved to set aside the order. Affidavits were presented on behalf of the people, setting forth that certain parts of the boiler attachments had been taken away, that the grand jury were considering the matter of further indictments relating to said matter, and that the said boiler and attachments were necessary exhibits in the prosecution of said cause. The circuit judge declined to set aside the order, and relator applies for a mandamus to compel such vacation.

"It is contended on behalf of relator that there is no warrant in law for the order of the circuit judge, and that the order violates section 26 of article 6 of the constitution, which protects the person, houses, papers, and possessions of every person from unreasonable searches and seizures. A 'search warrant' is defined as an examination or inspection, by authority of law, of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. 2 Howell's Statutes, section 9615 et seq., authorizes the issuance by a magistrate of search warrants in certain cases. Section 9619 provides that when any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any of the other things for which such warrant is allowed, the property and things so seized shall be safely kept, by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced or used as evidence on any trial, and afterward the stolen

or embezzled property shall be restored to the owner, and other things shall be destroyed. Section 9396 provides that when complaint is made on oath to any magistrate that complainant believes that any of the provisions of that act [for the prevention of cruelty to animals] are being violated, or are about to be violated, a search warrant may issue, and under the warrant such officer may arrest the person complained against, and seize and bring in every article or instrument designed or adapted to torture or inflict wounds upon any animal, etc. Section 9290 authorizes indecent books and pictures to be seized and taken. Section 9598 authorizes the disinterment of bodies for the purpose of inquests and post mortem examinations. Sections 9472-9475 provide that a magistrate may require a recognition from witnesses in criminal cases, with sureties, and upon failure to recognize or to give sureties, if ordered, that the witness may be committed to prison.

"It is contended that none of these statutes cover the present case, and insisted that there is an absence of authority for the order here made. But these statutes relate to preliminary or initiatory proceedings, and are designed to confer authority upon inferior tribunals, having no general powers. The statute confers upon circuit courts power to make all orders in any cause pending therein which may be necessary or proper for carrying into effect the jurisdiction vested in such courts by law. Suppose that the attendance of a witness in the trial of a criminal case has been with difficulty procured, and there is danger that he will abscond; has the circuit court no power to secure the attendance of such witness beyond the day? Yet there is no statutory provision conferring such authority, unless it be found in the statute conferring general authority. Suppose that, in the trial of a murder case, the court deemed it material, in order that the ends of justice be subserved, that the body be exhumed; has the court no power in the premises? Can it be true that a magistrate may commit the relator to prison, and that the circuit court, upon an indictment presented to it, has no authority respecting an article which has been before the grand jury, and which is, in and of itself, criminating evidence? Is an exploded boiler, or the right of property therein, more sacred than the person?

"The right of an officer to pursue a fleeing criminal in and upon my premises, and into my dwelling, does not depend upon the statute. There is no statute which authorizes an officer to take from a prisoner such evidence of guilt as may be found on the person—the bloody knife, the revolver with an empty chamber, garments stained with blood, the shoe or boot which fits the track, the coat with the missing button, the knife with the broken blade, the hat found at the scene of the crime. Such taking and use do not violate the rule that the prisoner shall not be compelled to furnish evidence against himself. It is not only the right, but the duty, of an officer making an arrest to take from the prisoner, not only stolen goods, but any articles which may be of use as proof in the trial of the offense with which the prisoner is charged: Wharton's Criminal Pleading and Practice, secs. 60, 61. He may take from the prisoner any articles of property which it is presumable may furnish evidence against him: 1 Bishop's New Criminal Procedure, sec. 210; *Rex v. O'Donnell*,



7 Car. & P. 138. This right of sequestration is plain, notwithstanding the property may be claimed by a third party; and stolen goods may be held as against the owner, if necessary for use as evidence, however clear the title of the claimant may be: *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23; *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459; *Commercial Exchange Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36; *Woolfolk v. State*, 81 Ga. 551. The right to impound exhibits, even in a civil case, has been generally exercised by the courts, and the right to hold articles found in possession of a person charged with crime is not limited to such as are supposed to be stolen, but extends to evidentiary articles. It is not the fact that there is a contest over the ownership of stolen goods that gives the people the right to retain them, but rather that they are of the *res gestae* and evidential. The prisoner's consent does not give the owner the right of possession, as against the people.

"The right to the possession and enjoyment of property must be subordinated to the law of overruling necessity. It is subject to the necessary burdens and restrictions imposed by the general police power of the state, in order to secure the general comfort, health, security, and protection of the citizen. The limitations upon the police power and its execution do not embrace such reasonable judicial orders as may be found necessary, in the course of the administration of the criminal law, for the detention of witnesses and the preservation of evidence. Police officers must be given a reasonable latitude in the pursuit of offenders, the detection of crime, and the collection of evidence; and the courts vested with jurisdiction to try such offenders must be allowed to exercise a reasonable discretion respecting the preservation of the evidence of crime in matters before them. The principle of the rule that permits the traveler upon the highway to go upon the abutting land when the highway is impassable; that permits entry upon my premises in case of fire, and the destruction of my property, if deemed necessary to stay the conflagration; that permits the inspector to enter my close, extends to measures necessary for the prevention of crime, the detection, pursuit, and arrest of offenders, and the preservation of criminalizing evidence. All are matters not alone of individual interest, but of public concern.

"The cases of *Entick v. Carrington*, 19 How. St. Tr. 1029, 2 Wils. 275, *Boyd v. United States*, 116 U. S. 616, and *Potter v. Beal*, 49 Fed. Rep. 793, are cases of paper searches and seizures, and involve the right of the government to invade private premises and search among private papers for evidences of crime, and the right to compel the production of one's own private papers in a criminal prosecution as evidence against himself. *Entick v. Carrington*, 19 How. St. Tr. 1029, 2 Wils. 275, was one of a series of cases of trespass, in which defendants attempted to justify under a warrant issued by the Earl of Halifax. The court held that the warrants were wholly without authority and void. The cases are fully discussed in *Cooley's Constitutional Limitations*, sixth edition, page 364, note.

"*Boyd v. United States*, 116 U. S. 616, was an information in a case of seizure and forfeiture of property against thirty-five cases of merchandise seized as forfeited under the revenue laws. At the

trial it became important to show the value of a previous invoice of twenty-nine cases of the same class of merchandise. The district judge made an order requiring the production of the invoice of the twenty-nine cases. The claimants, in obedience to the order, produced the invoice, under objection. When the invoice was offered in evidence, claimants objected to its reception on the ground that in a suit for forfeiture no evidence could be compelled from the claimants themselves, and that the statute, so far as it compelled the production of such evidence, was unconstitutional. The question which addressed itself to the court, as stated by Mr. Justice Bradley, was whether 'a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws,—is such a proceeding for such a purpose an unreasonable search and seizure, within the meaning of the fourth amendment of the constitution, or is it a legitimate proceeding?'

"Potter v. Beal, 49 Fed. Rep. 793, was a proceeding in equity against a bank receiver to recover the possession of certain private and personal books, papers, and other documents in a certain trunk, which was in the bank vault when the bank was closed by order of the comptroller. The relief sought was an order that the books, papers, and other documents be delivered to plaintiff, and that defendant be enjoined from using the same before the grand jury. Defendant answered that the trunk came into his possession as assets of the bank; that it was his duty to examine the contents thereof, and ascertain whether it contained property of the bank, or memoranda, books, papers, or accounts concerning its affairs. The district attorney, appearing, was permitted to intervene, and make a motion asking for such an order as would lay the papers before the grand jury. The court held that plaintiff was entitled to speedy possession of his private and confidential papers, but that the bank was entitled to know what was taken from its vaults, and referred it to a master, with directions to open the trunk, and, after examination, to deliver to defendant such papers, documents, and other things as were the property of the bank, and were not material to the issue; to deliver to plaintiff such as were private and were not the property of the bank, together with such as related to the bank transactions, and were necessary and material to be introduced by Mr. Potter in his own behalf; and that such as were not included in the two classes named, as related to bank transactions, and, in the judgment of the master, were or might be material to the issue suggested in the motion of the district attorney and the government's case, should be sealed and returned to the trunk and the safe custody of the clerk, who should relock the trunk, return the key to the counsel for plaintiff, but hold the trunk and contents.

"These cases do not hold that all searches and seizures are unreasonable. They do hold that the invasion of the privacy of one's home, and the seizure of private papers and documents, is an unreasonable search and seizure, and is within not only the article of the constitution prohibiting unreasonable searches and seizures, but also the article that no person shall be compelled to give evidence against himself. The rule is, however, that forged documents, or



such as are unlawfully held or unlawfully used, are subject to seizure. In *Langdon v. People*, 133 Ill. 382, a complaint was made by the states attorney that one P. R. Langdon had forged an official certificate, and that complainant verily believed that such certificate was concealed in the office lately occupied by said Langdon. Thereupon a search warrant was issued, and the forged certificate brought before the justice who issued the warrant. The court held that the certificate was not a private paper, within the rule of *Boyd v. United States*, 116 U. S. 616; that it was a forged paper; and that it was unlawful for plaintiff in error to have it in his possession.

"In *Commonwealth v. Dana*, 2 Met. 329, the court, speaking of the constitutional provision relating to searches and seizures, say: 'This article does not prohibit all searches and seizures of a man's person, his papers, and possessions, but such only as are unreasonable, and the foundation of which is not previously supported by oath or affirmation. The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law, therefore, authorizing search warrants in certain cases, is in no respect inconsistent with the declaration of rights.'

"Mr. Cooley, in his *Constitutional Limitations*, sixth edition, page 370, says that the warrant is not allowed for the purpose of obtaining evidence of an intended crime, but only after lawful evidence of an offense actually committed; nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases, where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. In a note the author says: 'We do not say that it would be incompetent to authorize by statute the issue of search warrants for the prevention of offenses in some cases; but it is difficult to state any case in which it might be proper, except in such cases of attempts or of preparations to commit crime as are in themselves criminal.'

"The present case is not one where it is sought to compel relator to produce evidence against herself, for she is not the person charged; and, even if she were, the use of the boiler as evidence cannot be distinguished from any case where the instrument causing the death is produced, although taken from the prisoner, or found in defendant's apartments. Nor is this a case where any attempt has been made to invade private premises for the discovery of evidence of crime. An explosion had occurred, and thirty-seven persons had lost their lives in consequence. The matter was submitted to the grand jury, and they have brought in, and presented to the court making the order complained of, an indictment against the person in charge of the boiler at the time of the explosion, charging him with criminal carelessness with respect to the care and management of the boiler. It is insisted that the boiler, in and of itself, is evidence of the causes which led to the explosion, and of the carelessness of the management. It is true that in counsel's brief it is said that the relator 'may be subjected to suits by persons who received injuries by the destruction of the building'; but there is no good reason why the



police authorities, whose mission is in part the protection of property, cannot in this particular case be intrusted with the preservation of the status quo of this property, especially as the same is held under an order of the court, and subject to its direction.

"It frequently happens that animals affected with infectious diseases are killed by the public authorities to prevent the spread of the disease; and if the poor man's team had been stolen, and taken from the thief, the necessity for its use would not necessarily determine the owner's right to its possession. If, in a partially burned building, there were found a package of combustible material saturated with kerosene, would there be any question of the right of the authorities to take and preserve the package for use as evidence? Illustrations of what might readily be held to be unreasonable seizures could be multiplied without effort, but they would be without force. The prohibition is against unreasonable seizures, and all seizures are not regarded as unreasonable. The question here is, whether this is an unreasonable seizure. Relator's contention is, that any impounding of any of her property for the purpose named is unwarranted. Because a man may not be put out of his own house, it does not follow that a revolver or a steel drill, or a knife, may not be sequestered for use as evidence in a criminal proceeding. Because a man's team with which he earns a livelihood, which has been used by another to convey away stolen goods, may not be impounded, it does not follow that the status quo of an exploded boiler, the negligent use of which, resulting in the death of thirty-seven persons, is charged as manslaughter, concerning which no claim is made of a desire for its use, and which in fact does not appear to be other than useless, except for scrap-iron, may not be preserved for use as evidence upon the trial of the offense charged, especially as it is claimed by the record here that the police authorities have, since the explosion, been endeavoring to exercise a certain surveillance over it, and in that endeavor a conflict between police officers, counsel for the accused, and the owner has arisen, and certain of the connections of the boiler have been spirited away.

"It is urged that some common or statute law authorizing such a seizure should be pointed out. The cases referred to sustain the right to hold evidentiary articles, irrespective of the question of ownership, and as against the owner; and no case can be found which disputes this right, or intimates that such articles cannot be seized and impounded, where the rules referred to in *Entick v. Carrington*, 19 How. St. Tr. 1029, 2 Wils. 275, and *Boyd v. United States*, 116 U. S. 616, are not infringed. Those cases do not intimate that a search warrant may not issue in a proper case for the discovery and seizure of evidences of crime. The officers of the law, to whom is committed the prevention and detection of crime and the collection of criminating evidence, are daily committing acts for which there is no express authority in the statutes, or elsewhere in the books. In the recent notorious *Holmes* cases (*Commonwealth v. Mudgett*, 174 Pa. St. 211), the officers of the law, in their efforts to secure criminating evidence, entered upon private property, and excavated under cellar floors and elsewhere, and no one raised any question as to the right

so to do. Such acts are generally regarded as demanded by public necessity, in the interest of good morals and the detection and punishment of crime—matters of public concern, to which the right of the owner to immediate possession of his property must at times be subordinated.

"The police authorities certainly had the undoubted right to make an investigation under the direction of the prosecuting officers. Upon the presentation of the indictment, the court making the order obtained jurisdiction of the matter. It cannot be said that the court would not have the power, had it been found necessary, to compel witnesses to give sureties for their appearance, or to commit them on refusal so to do. If this be true, can it be seriously contended that this exploded boiler cannot be impounded? The court might, in such case, order the witness into custody, although not before the court. While the order here was not technically a search warrant, yet it was in the nature of one, omitting the direction to search, and directing the officer to take into custody an article which was fully identified, and admitted to be the one with respect to which the criminal carelessness is charged, and the explosion of which is conceded to have been the cause of the loss of life. It was its unlawful use that is alleged to have produced the result. The possession is that of the court, and is but temporary. If it be claimed that the deprivation of the use is a serious inconvenience, the court may be appealed to, and possibly some means may be devised to preserve the evidence and release the property; but that is a matter which should be addressed to the judgment and discretion of the court making the order. The writ should be denied."

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**CONSTITUTIONAL LAW—UNREASONABLE SEARCHES AND SEIZURES.**—While a person is in custody on a criminal charge it is not unreasonable to subject him to a personal search and examination against his will to discover upon him evidence of his criminality; Note to *Pickett v. State*, 59 Am. St. Rep. 226; but a person, not under arrest, cannot be compelled to produce books and papers to be used against himself in a criminal proceeding. All searches and seizures which have hitherto been unknown to the law should be regarded as "unreasonable," leaving parties and the public to the accustomed remedies: See extended note to *State v. Davis*, 32 Am. St. Rep. 645, on the right of a person to protection of books and papers from examination. Compare *Lester v. People*, 150 Ill. 408; 41 Am. St. Rep. 375.

## BULLARD v. AMERICAN EXPRESS COMPANY.

[107 MICHIGAN, 695.]

**EXPRESS COMPANIES—DELIVERY—FIXED LIMITS—DISCRIMINATION.**—If an express company has, in apparent good faith, and with regard to public requirements, assumed to fix limits in a city beyond which it will not call for or deliver packages, it is not bound, as to one who has dealt with it, and who has knowledge of the limits established, to go beyond such limits to receive goods for shipment, or to deliver packages, even where the established limits extend, in some directions, a greater distance from the express office than it is to the plaintiff's place of business.

Case by Chandler G. Bullard, survivor of himself and Zenas H. Bullard, late copartners, against the American Express Company, to recover damages occasioned by the company's refusal to call for, and deliver packages, at plaintiff's place of business. The court directed a verdict for the defendant, and from a judgment thereon, the plaintiff appealed.

Samuel W. Oxenford, for the appellant.

Howard & Roos, for the appellee.

**696** MONTGOMERY, J. This is an action in case, commenced in justice's court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses, and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his shipments, and to deliver packages to him, which defendant **697** refused to do; that defendant collects for shipment from and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, conditions, and situation as the plaintiff, and for shippers at a greater distance from its place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff by such refusal; that plaintiff has been



damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice's court. In the circuit court the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in evidence that plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, caused damage to plaintiff.

At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of a custom of receiving goods at other places: *Hutchinson on Carriers*, secs. 82, 87; *Blanchard v. Isaacs*, 3 Barb. 388. But it is insisted that the defendant in this case, having practiced the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent <sup>608</sup> for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them.

The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee: *Wood's Browne on Carriers*, sec. 230; *Hutchinson on Carriers*, sec. 379. The question of how far this duty may be escaped by usage is not well settled. It has been

held, however, that when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not unreasonable to require the consignee to call at the office: *Hutchinson on Carriers*, sec. 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in apparent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with it having knowledge of this fact, it is not bound to deliver beyond these limits. We do not determine what the rights of one not having knowledge of these limits would be. This is not <sup>699</sup> such a case. But in this case we think the court committed no error in directing a verdict for the defendant.

Judgment will be affirmed.

Long, Grant, and Hooker, JJ., concurred.

McGrath, C. J., did not sit.

#### Duties of Express Companies as Common Carriers.\*

*Express Companies are Common Carriers.*—An express company carrying money, goods, and parcels for hire, from one locality to another is a common carrier, and subject to all the latter's duties and responsibilities: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89; *Baldwin v. American Exp. Co.*, 23 Ill. 197; 74 Am. Dec. 190; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Stadhecker v. Combs*, 9 Rich. 193; *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369. Express companies which are engaged not only in the transportation of small parcels, packages, and articles of value, properly so-called, but also in the carriage of goods, wares, and merchandise, and of the great staples and products of the country, are common carriers, and subject to the liabilities imposed by law upon such persons: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am.

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\*REFERENCES TO MONOGRAPHIC NOTES.

Common carriers, who liable as: 47 Am. Dec. 648-654

Discriminations by railways, what are unreasonable and unlawful: 11 Am. 8\* Rep. 647-655.

Rep. 140. It is not necessary that they should own, or have an interest in, the conveyance by which the property is transported. Express companies who forward goods from place to place for hire, but in conveyances owned and managed by others, are common carriers, not forwarders: *Christenson v. American Exp. Co.*, 15 Minn. 270; 2 Am. Rep. 122; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; monographic note to *Chevallier v. Straham*, 47 Am. Dec. 650, on who are liable as common carriers. Express companies are sometimes declared by statute to be common carriers, and transportation by them regulated by statute: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Fargo v. Ledger-Standard Co.*, 59 Ind. 496; *United States Exp. Co. v. Rush*, 24 Ind. 403. A city express company engaged in carrying travelers' trunks from the passenger depots of the several railroads is a common carrier. Express companies have in some instances, but without success, attempted to escape from liability as common carriers by assuming other names, as forwarders, transportation companies, etc., and contracting to convey the goods in that character: Note to *Chevallier v. Straham*, 47 Am. Dec. 650. A person engaged as a common carrier cannot, by declaring or stipulating that he shall not be so considered, divest himself of the liability attached to the fixed legal character of that occupation: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174.

It may be here said that express companies have no absolute rights upon railroads. A railroad company is not required, either by usage or by the common law, to transport the traffic of independent express companies over its lines in the manner in which such traffic is usually carried and handled. It is not bound to do more, as express carriers, than to provide the public at large with reasonable express accommodation. Hence, it need not, in the absence of a controlling statute, furnish to all independent express companies equal facilities for doing an express business upon its passenger trains: Express cases, 117 U. S. 1; monographic note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 653, on discriminations by railways, what are unreasonable and unlawful; *Atlantic Exp. Co. v. Wilmington etc. R. R. Co.*, 111 N. C. 463; 32 Am. St. Rep. 805. Contra, *New England Exp. Co. v. Maine Cent. R. R. Co.*, 57 Me. 188; 2 Am. Rep. 31; *Kidder v. Fitchburg R. R. Co.*, 165 Mass. 398. Before the decision of the Express cases, 117 U. S. 1, some of the lower federal courts also adhered to the contrary doctrine: See *Dinsmore v. Louisville etc. Ry. Co.*, 2 Fed. Rep. 465; *Southern Exp. Co. v. Louisville etc. R. R. Co.*, 4 Fed. Rep. 481; *Texas Exp. Co. v. Texas etc. Ry. Co.*, 6 Fed. Rep. 426; *Southern Exp. Co. v. Memphis etc. R. R. Co.*, 8 Fed. Rep. 799; *Southern Exp. Co. v. St. Louis etc. Ry. Co.*, 10 Fed. Rep. 210; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 18 Fed. Rep. 517; *Fargo v. Redfield*, 22 Fed. Rep. 373. An express company, as a common carrier itself, is bound to carry articles within the scope of its business, without any other contract than such as the law would imply: *Adams Exp. Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510. But compare subheads, *infra*, treating of limiting liability. An express company, independently organized as a corporation to transact the express business on its own account, is not subject to the provisions of the interstate commerce act: *United States v. Morsman*, 42 Fed. Rep. 448.



*General Duties and Liabilities.*—A common carrier, such as an express company, is bound by law, for a reasonable reward, to receive and carry goods for transportation, subject to all the responsibilities legally incident to his employment. He has no right to refuse to receive and transport goods because the shipper refuses to assent to a special contract of shipment which limits his common-law liability. If he does so, he is answerable in damages: *Southern Exp. Co. v. Moon*, 39 Miss. 822, 831. Such a company is also required, as a common carrier, to transport goods to the place of destination: *American etc. Exp. Co. v. Wolf*, 79 Ill. 430; and the further duty is enjoined upon it to deliver the goods to the consignee at his residence or place of business: *American etc. Exp. Co. v. Wolf*, 79 Ill. 430. The ordinary contract of an express company is, that it will carry the packages or goods intrusted to it, and deliver them to the consignee, at the proper time, and at the proper place, without loss or failure, except by the act of God or of the public enemy: *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Southern Exp. Co. v. Moon*, 39 Miss. 822, 831.

A regulation of an express company that money will be received for shipment only on the morning before the train passes on which it is to be transported will not protect the company in an action brought to recover a penalty incurred by the violation of a statute which requires all transportation companies to receive goods of the kind and nature usually transported by them whenever rendered. It is the duty of the company to have a safe place of storage for the money when it is offered for shipment: *Alsop v. Southern Exp. Co.*, 104 N. C. 278. But the delivery of a package of money to the clerk of an express company's agent, outside of the agent's office, does not make the company answerable for its loss, while in the hands of the clerk, and before it comes into the actual possession of the agent: *Cronkite v. Wells*, 32 N. Y. 247. The degree of care and diligence which an express company is bound to bestow upon property intrusted to it for transportation, depends upon its value and quality: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89.

It is not essential to the liability of an express company that it should have given a receipt for the property consigned to it for transportation. The fact that it came into the possession of the company as a common carrier may be shown by other evidence: *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; and the liability of the company for the safe delivery of property which has come into its possession as a common carrier is the same whether it was received directly from the owner or from another company to whom it was originally delivered: *Gulliver v. Adams Exp. Co.*, 38 Ill. 503. The liability of an express company as a common carrier commences with the delivery of goods to it, or its agent, at the place where the company is accustomed to receive goods, or where, in individual cases, it agrees to receive them: *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; and this liability continues until the delivery of the goods at their destination; but it terminates if the consignee is absent, and the company cannot, after diligent inquiry, find him or ascertain his place of residence or business: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691. It can discharge

itself of liability as a common carrier in no other way than by an actual delivery of the goods to the proper person, at his residence or place of business, except by proving that it has been excused from doing so, or has been prevented by the act of God, or the public enemy: *American etc. Exp. Co. v. Wolf*, 79 Ill. 430; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Southern Exp. Co. v. Moon*, 39 Miss. 822. If the consignee cannot be found, it is still the duty of the carrier to take care of the goods by holding them himself, or by depositing them with some suitable person for the consignee. In such a case, the person holding the goods becomes the bailee of the owner or consignee, and is bound only to reasonable diligence: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691. If the company tenders the goods transported to the consignee, who fails to receive and pay for them, it is the company's duty to notify the consignor. The company is relieved of its responsibility as a common carrier when this is done, but it cannot so relieve itself by storing the goods, and holding them in store until they become worthless, before any notice is given to the consignor: *American etc. Exp. Co. v. Wolf*, 79 Ill. 430.

*Limiting Liability, Generally.*—An express company cannot stipulate against its own negligence. It is against public policy to permit it, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of itself or its agents: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Galt v. Adams Exp. Co.*, MacAr. & M. 124; 48 Am. Rep. 742; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211; *Christenson v. American Exp. Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Express Co. v. Kountze*, 8 Wall. 342; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369; *Earnest v. Express Co.*, 1 Woods, 573; *Ketchum v. American etc. Exp. Co.*, 52 Mo. 390; *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

An express company may, however, by special or express contract, limit its common law liability against risks not arising from its own negligence or misconduct, or that of its agents: *Durgin v. American Exp. Co.*, 66 N. H. 277; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Rep. 385; *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107; *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369; *Earnest v. Express Co.*, 1 Woods, 573; *Adams Exp. Co. v. Guthrie*, 9 Bush, 78; *Brehme v. Adams Exp. Co.*, 25 Md. 328; *Ketchum v. American etc. Exp. Co.*, 52 Mo. 390; *Boorman v. American Exp. Co.*, 21 Wis. 152; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575.



But such contract must be reasonable in itself, and not such as to operate as a snare or fraud upon the public. It must be made without duress, fraud, imposition, or delusion. It must be fairly made, and freely and voluntarily entered into by the shipper: *Adams Exp. Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332; *Adams Exp. Co. v. Guthrie*, 9 Bush, 78; *Adams Exp. Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510; *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783. While an express company may limit its common-law liability by an express contract or acceptance of goods, requiring reasonable regulations as to the manner of delivery, and entry of packages, information as to their contents, etc., and be liable only according to the terms of such contract or acceptance, it cannot, in that manner, shield itself from fraud, negligence, or want of care: *Kallman v. United States Exp. Co.*, 3 Kan. 205. The only effect of such an agreement is to relieve the company from the liabilities imposed by the common law where it is free from fault or neglect: *Union Exp. Co. v. Graham*, 26 Ohio St. 595. Although an express company restricts its common-law liability by special contract, it still remains a common carrier, notwithstanding such contract, but with its common-law liability restricted in so far as it may be lawfully restricted by the contract. The company may, by contract, restrict its liability as an insurer, but it will not be permitted to assume the position of an ordinary bailee. The law will still hold it to a higher degree of care than is required of a private carrier, and the rule as to the burden of proof still prevails. If the goods are lost, whatever may have been the agreement with the shipper, the law will presume that they were lost through the fault of the company, unless it shows the contrary: *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369, 377. An express company cannot, by contract, change its liability to that of a mere forwarder: *Galt v. Adams Exp. Co.*, *MacAr. & M.* 124; 48 Am. Rep. 742; *Christenson v. American Exp. Co.*, 15 Minn. 122; 2 Am. Rep. 122; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; 93 Am. Dec. 68. Compare *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211.

*Limiting Liability by Receipts or Bills of Lading.*—Public policy demands that the right of the owners to absolute security against the negligence of an express company in transporting goods shall not be taken away by any reservation in the company's receipt, or by any arrangement between the company and agencies employed by it to perform the service of carriage: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 185; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211; and we understand that an express company is answerable for a loss of goods intrusted to it, occasioned through the negligence of the company or its agents, whatever may be the terms of the shipper's receipt. In other words, the company is answerable for actual negligence, even admitting that the receipt given by it is legally sufficient to restrict its common-law liability: *Express Co. v. Kountze*, 8 Wall. 342; *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *Southern Exp. Co. v. Moon*, 39 Miss. 822.



Thus, a stipulation in a receipt or bill of lading exempting an express company from liability "for any loss or damage by fire" does not absolve the company, if the loss occurs through the negligence of its agent, a railroad company employed by the express company to transport the goods in controversy: *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174. But the company is not answerable for loss by fire unless it was occasioned by the company's negligence: *Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516. The receipt of an express company for goods intrusted to it for transportation for hire, and which restricts the liability of the company, will not be construed as exempting the company from liability for loss occasioned by negligence in the agencies it employs, unless the intention to thus exonerate the company is expressed in the instrument in plain and unequivocal terms: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211. The effect of a restrictive clause in an express company's receipt, signed by it alone and given to the shipper, stating that the company is "not to be responsible except as forwarder," where it undertakes to transport bullion for hire, from one place to another, "and deliver to address," is not to exempt it from liability for loss occasioned by the carelessness or negligence of the employés on a steamboat owned and controlled by other parties than the company, but ordinarily used by it, as a means of conveyance, in its business as carrier. The managers and employés of the boat are, in such a case, the agents of the express company: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211. It is true that an express company which undertakes to perform an entire service has no authority to constitute another person or corporation the agent of the consignor or consignee, but it may employ an agency, that is subordinate to the company, and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it. Its acts become those of the company, because done in its service, and by its direction: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174.

While an express company cannot, by receipt, stipulate against its own negligence, it may, by a receipt or bill of lading, restrict its common-law liability, by bringing knowledge of such restriction home to the shipper, and securing his assent thereto: *Brehme v. Adams Exp. Co.*, 25 Md. 328; *Durgin v. American Exp. Co.*, 66 N. H. 277. The latter's retention of a receipt without dissent is equivalent to an assent: *Durgin v. American Exp. Co.*, 66 N. H. 277; *Boorman v. American Exp. Co.*, 21 Wis. 152; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575. Compare *Southern Exp. Co. v. Moon*, 39 Miss. 822. The company cannot, however, limit its liability, by a receipt subsequently given, where no receipt was given when the package was taken for shipment, and there is nothing to show that the company intended, at first, to limit its liability: *American Exp. Co. v. Spellman*, 90 Ill. 455. But the facts, especially in those cases where the company seeks to discharge itself from duties which the law has annexed to its employment, must show the shipper's assent to the restriction: *Buckland v. Adams Exp. Co.*, 97 Mass. 124; 93 Am. Dec. 68. A printed form of receipt, generally used by the company, but not used in a particular case, and not shown to have been known to

the shipper, would not show such assent: *Southern Exp. Co. v. Womack*, 1 Helsk. 256. So, the delivery of a printed receipt, in a dimly lighted railway car, for baggage, by the agent of a baggage express company, who says nothing of its contents to the receiver, who cannot read it, does not, under the circumstances, create a contract according to its terms, but is a question for the jury: *Madan v. Sherard*, 73 N. Y. 329; 29 Am. Rep. 153. Still, the shipper's acceptance, without objection, of a receipt for goods, which contains a restriction of an express company's common-law liability, is generally held to constitute a contract binding on him, as the company, under such circumstances, has a right to infer an assent on his part to such conditions in the receipt as are not unusual or unreasonable: *Durgin v. American Exp. Co.*, 66 N. H. 277; *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575.

*Limiting Liability by Notice.*—An express company cannot, by notice, relieve itself from the consequences of its own negligence or misconduct, or that of its agents or employes: *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; and such a company cannot, by general notices, limit its common-law liability as insurer, etc., unless they are reduced to the form of a special stipulation; and signed by the party sending the goods, or be so brought home to his knowledge as to show his assent thereto. Such stipulation must also be just and reasonable: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140. Thus, a notice at the head of a receipt given by an express company, for freight, stating that shippers must have the value of their packages inserted in such receipt, or the company will not be answerable for an amount over fifty dollars, is not sufficient to constitute a contract, if it is not proved to have been brought to the knowledge of the shipper: *Fibel v. Livingston*, 64 Barb. 179. A distinction, however, exists between the effect of those notices by an express company which seek to discharge it from duties which the law has annexed to its employment, and those, like stating the true value of articles shipped, designed simply to insure good faith and fair dealing on the part of the shipper. In the former case, notice, without an assent to the attempted restriction, is ineffectual: *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; but in the latter, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, is sufficient: *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Earnest v. Express Co.*, 1 Woods, 573.

*Limiting Liability as to Value.*—A condition in a receipt given by an express company, limiting its liability to a certain sum, unless the value of the article shipped is stated therein does not exempt the company from liability for the full value of the article where it is lost by the negligence or fraud of the company or its agents: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *Magnin v. Dinsmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300; *Adams Exp.*



*Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57. So, an express company is answerable for the value of goods lost through its negligence, or that of its agents, although the bill of lading provides that the company shall not be answerable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement can, at most, cover a loss arising from some cause other than the negligence or default of the company or its agents, and the rule of damages is the same, although less is charged and paid for the transportation than would be the case if the real value were given: *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

In cases not turning upon the negligence or misconduct of the express company or its agents, the cases are conflicting as to whether the company can, by a clause in a receipt or bill of lading, exempt itself from liability beyond an amount specified, which is usually fifty dollars, where the value of the goods shipped is not stated by the shipper and inserted in the receipt. A recovery for the full value was allowed in *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Kember v. Southern Exp. Co.*, 22 La. Ann. 158; 2 Am. Rep. 719; *Southern Exp. Co. v. Armstead*, 50 Ala. 350; *Wood v. Southern Exp. Co.*, 95 Ga. 451; *Grossman v. Dodd*, 63 Hun, 324. One ground for such holdings was, that a stipulation in the company's receipt, exempting it from liability beyond an amount specified, where the value of the goods shipped was not stated by the shipper and designated in the receipt, was not effectual because it did not appear that the shipper had assented to the stipulation: *Wood v. Southern Exp. Co.*, 95 Ga. 451; *Grossman v. Dodd*, 63 Hun, 324; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57. The assent of a shipper to the limitations in a bill of lading, as to value, has been held not to be necessarily presumed from the acceptance of the bill: *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57. The fact that the shipper accepts a receipt in which it is set forth that the package is an ordinary one, and that the liability of the company therefor, in case of loss, shall not exceed fifty dollars, does not limit its liability to that amount, where the shipper informed the company's agent when the latter took the package for shipment that it was gold, but the value thereof was not specified in the receipt: *Kember v. Southern Exp. Co.*, 22 La. Ann. 158; 2 Am. Rep. 719. In *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783, an express company gave a receipt for goods received by it, in which was printed a provision that the company would be liable for no loss whatever not occurring through their fraud or gross negligence, and where no value was expressed in the receipt, they would be only liable for fifty dollars; but this was held not to be such an express contract as would relieve the company from its common-law liability. Even where the shipping receipt contains a stipulation that the company will not be answerable for loss beyond a specified sum, being less than the value of the goods shipped, and that the company shall be held answerable only for gross negligence, and such stipulations are assented to by the shipper, still



the company is answerable for the use of reasonable care, because it cannot, by contract, excuse itself from reasonable care and diligence: *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57.

On the other hand, if the shipper accepts, without dissent, a receipt or bill of lading, which contains a stipulation that the company will not be answerable beyond an amount specified, unless the value of the goods shipped is stated, and the amount thereof designated in the receipt, he is, by the weight of authority, held to the terms of his receipt or contract, and, in case of loss, his recovery, where the value of the property is not given, is ordinarily limited to the amount stated in his receipt, with interest: *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; 70 N. Y. 410; 26 Am. Rep. 608; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Boorman v. American Exp. Co.*, 21 Wis. 152; *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Fibel v. Livingston*, 64 Barb. 179; *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Brehme v. Adams Exp. Co.*, 25 Md. 328; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Earnest v. Express Co.*, 1 Woods, 573. These cases proceed upon the theory that the shipper, by accepting a receipt with the value limited to a certain amount, and omitting to have a different value expressed, assents to the valuation at the sum stated in the receipt, and to a limitation of his claim, in case of loss, to that sum: See *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; 70 N. Y. 410; 26 Am. Rep. 608; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Fibel v. Livingston*, 64 Barb. 179; *Boorman v. American Exp. Co.*, 21 Wis. 152; *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107. A shipper of goods who fills out a blank receipt contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt, and, if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed: *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107. If a receipt for a package, containing a limitation as to value, is shown to have been in the shipper's custody, a due delivery of it to him, and his assent to its terms, are to be presumed, and it is for him to show that there was no such delivery, or no such assent: *Boorman v. American Exp. Co.*, 21 Wis. 152. It is too late, after a loss, for him to object that he neglected to read the receipt, and was ignorant that it contained such a condition: *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475. So, where the company limits its liability, in a receipt, to a stated sum, but does not give the value of the goods therein, the company is relieved from liability, in case of loss, for a greater sum than the one stated in the receipt, where the terms of a notice so restricting the company's liability have been brought home to the knowledge of the shipper: *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596.

If a shipper accepts carriage upon the terms of a limited liability, silence is the same as an assertion of little value. Silence as to

value not only deprives the company of its adequate reward, but misleads it as to the degree of care and security which it should provide. So, where value is limited to a specified amount, but the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone, on the part of the shipper, as to the real value, although there is no inquiry as to value, and no artifice to deceive, is held to be such a fraud in law as to discharge the company from liability, beyond the amount limited, for a loss, not occurring through its misfeasance, the abandonment of its character as a carrier, or other willful act, but from ordinary negligence: *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; 70 N. Y. 410; 26 Am. Rep. 608. An omission, in such a case, upon the part of the company, to inquire about value, is not a waiver of the limitation in the contract; and the disclosure of value is a condition precedent to the company's liability for mere ordinary negligence, unaccompanied by any misfeasance or willful act. Negligence alone, in such a case, is not misfeasance, or an abandonment of the company's character as carrier, which will deprive it of the benefit of the limitation: *Magnin v. Dinsmore*, 70 N. Y. 410; 26 Am. Rep. 608.

In *Earnest v. Express Co.*, 1 Woods, 573, an express company made known, by notice brought home to a shipper, that it would not be answerable for more than fifty dollars for the loss of an unvalued package. A shipper, to avoid paying the regular charges of the company, failed to disclose the value of a package, containing four valuable diamond rings, delivered for carriage, and led the company to treat it as of small value. The package was lost, and the shipper was allowed to recover but fifty dollars. "If public policy," said the court, "allows a common carrier to make such a contract, it must be enforced. Common carriers have a right to demand good faith and fair dealing from those who do business with them. It strikes the common sense as a gross injustice that a party who, to avoid paying the regular charges therefor, conceals the value of a package, and thereby throws the carrier off his guard, and induces him to treat the package as of small value, whereby it is lost, should recover its full value when he has expressly agreed, in case of loss, that he would only demand a stated sum, much less than the true value. That is the case here. It is evident from the facts that if the value of the package had been stated, it would not have been lost. It would have been put in a pouch, and the pouch in an iron chest. The package, being unvalued, was supposed to be of little value, and was treated as such by the carrier. He was induced to relax the care and vigilance he would have used had the package been marked with its true value. By reason of that relaxation, the package was lost. Its loss is the direct consequence of the conduct of the defendant in refusing to give its value in order that he might escape the payment of full charges. He has agreed that, in case of loss, his compensation therefor should be fifty dollars, and he is bound by his contract": *Earnest v. Express Co.*, 1 Woods, 573, 579. Independently of the qualifying words in a receipt containing a limitation as to value, the court, in *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596, was inclined to

exempt the company from liability, on the ground of want of good faith in not disclosing the value of the goods.

*Limitation as to Presentation of Claim.*—A stipulation, in an express company's receipt for a package, that the company shall not be answerable for any loss, unless a written claim therefor shall be made at the shipping office within a certain specified time from a given date is held, in some cases, to be valid, and must be complied with: *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Rep. 385; *Express Co. v. Caldwell*, 21 Wall. 264; *Northern Pac. Exp. Co. v. Martin*, 26 Can. S. C. 135; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Glenn v. Southern Exp. Co.*, 86 Tenn. 594. The company, when liable, is entitled to notice, where property is lost, in order that it may be traced: *Southern Exp. Co. v. Glenn*, 16 Lea, 472; and, though the claim is required by the receipt to be made at the office of shipment, it is sufficient if made upon some agent or officer of the company chargeable with the loss: *United States Exp. Co. v. Harris*, 51 Ind. 127. The company may waive such condition by not exacting a compliance therewith: *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49; *United States etc. Co. v. Southern Exp. Co.*, 120 N. C. 351.

Other cases hold that a stipulation by an express company, contained in a receipt or bill of lading, that it shall not be liable for loss or damage, unless demand of payment therefor is made within a given time from the date of the receipt or bill of lading, is an unreasonable restriction of its liability, and, therefore, void: *Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348; 58 Am. St. Rep. 795; *United States etc. Co. v. Southern Exp. Co.*, 120 N. C. 351; *Adams Exp. Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332; *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517; *Southern Exp. Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118; *Porter v. Southern Exp. Co.*, 4 S. C. 135; 16 Am. Rep. 762. And this is probably the sounder rule, unless innumerable excuses are admitted for a failure to make the claim in time. If the failure to make the claim as required by such a stipulation occurs without the fault or negligence of the parties entitled to the money, the failure should be excused, and ought not to prevent a recovery for the loss: *Glenn v. Southern Exp. Co.*, 86 Tenn. 594. Such a stipulation would appear to be clearly unreasonable where the time required for transit between the place where the package is delivered to the company and that to which it is consigned is long, and the limitation as to the time for presenting a claim short: *Express Co. v. Caldwell*, 21 Wall. 264; or where the shipper is not informed of nondelivery until a year has elapsed from the date of the receipt: *Southern Exp. Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118; or where, during times of war, transportation is much interrupted: *Adams Exp. Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332; or where, the limitation being thirty days, the company has instructed its agents not to return undelivered packages until the expiration of thirty days from their arrival at their destination: *Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348; 58 Am. St. Rep. 795.

And it is quite clear that a condition in the receipt or bill of lading of an express company, exempting it from liability, in case of loss, unless a claim is presented therefor within a time limited, does not apply to a loss occasioned by the company's delay or negligence:



*Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300; *Vroman v. American etc. Exp.*, 2 Hun, 512; 5 Thomp. & C. 22. It would not apply in case of the neglect or refusal of the company to pay the money received on a draft intrusted to it for transmission and collection: *Bardwell v. American Exp. Co.*, 35 Minn. 344. So a receipt issued by an express company for an article when received for transportation containing a condition that the company will not "be liable for any loss or damage, unless the claim therefor shall be presented in writing at this office within thirty days after this date," does not limit the liability of the company for damages in neglecting and delaying to forward an article received for transportation by the office issuing the receipt: *Baltimore etc. Exp. Co. v. Cooper*, 66 Miss. 558; 14 Am. St. Rep. 586.

*Limiting Liability over Connecting Lines.*—If goods are to be delivered at a point beyond the line of an express company's conveyance, the duty of the company, there being no contract or undertaking to the contrary, is ended where it transports the goods to the end of its own line and there delivers them to the succeeding carrier. The company, after doing this, is not answerable for a subsequent loss, where the succeeding carrier is not the agent of the express company, and is not, in any way, under its direction or control: *Coates v. United States Exp. Co.*, 45 Mo. 238; *Hadd v. United States etc. Exp. Co.*, 52 Vt. 335; 36 Am. Rep. 757; *Grindle v. Eastern Exp. Co.*, 67 Me. 317; 24 Am. Rep. 31; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Reed v. United States Exp. Co.*, 48 N. Y. 562; 8 Am. Rep. 561; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *Gibson v. American etc. Exp. Co.*, 3 Thomp. & C. 501; 1 Hun, 387; *Boorman v. American Exp. Co.*, 21 Wis. 152; *United States Exp. Co. v. Rush*, 24 Ind. 403; *United States Exp. Co. v. Haines*, 67 Ill. 137. Especially is this true where the express company has, by receipt or otherwise, expressly contracted that it shall not be liable for a loss at a point not on its own line: *Gibson v. American etc. Exp. Co.*, 3 Thomp. & C. 501; 1 Hun, 387; *Boorman v. American Exp. Co.*, 21 Wis. 152; *United States Exp. Co. v. Haines*, 67 Ill. 137; *Pendergast v. Adams Exp. Co.*, 101 Mass. 120; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; and the company's right to exemption is not altered by a direction to collect on delivery: *Gibson v. American etc. Exp. Co.*, 3 Thomp. & C. 501; 1 Hun, 387; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; or by the fact that it has received through charges: *Hadd v. United States etc. Exp. Co.*, 52 Vt. 335; 36 Am. Rep. 757, *Contra*, *St. John v. Express Co.*, 1 Woods, 612. The company cannot, however, exempt itself from liability for its negligence: *Snider v. Adams Exp. Co.*, 63 Mo. 376.

If one express company, at the end of its line, delivers a package to another for transportation, and the latter receives it under no special arrangement as to liability, it is subject only to the general responsibility of express carriers, without limitation or qualification, except that which the law attaches to such carriers: *Witbeck v. Holland*, 38 How. Pr. 273; 55 Barb. 443. A contract between the company receiving the package and the consignor has no effect upon, and does not control, the liability of the company to whom the package

was delivered by the one receiving it: *Witbeck v. Holland*, 38 How. Tr. 273; 55 Barb. 443. Thus, the second company is not a party to a contract between the first company and the consignor, which limits the liability for any loss or damage to a specified amount, unless the value thereof is stated in the receipt, and the second company cannot avail itself of the conditions thereof: *Martin v. American Exp. Co.*, 19 Wis. 336.

While an express company which receives a parcel to carry as far as it goes, and then to send it farther, may exempt itself, by special contract, from the performance of any act or duty in respect thereto, off its own routes, it cannot do this where it undertakes to perform the entire service, and employs the connecting carrier or company as one of its agents to complete such performance: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174. In the absence of special contract, subcarriers are agents of the carrier or express company, and not agents of the shipper: *Express Co. v. Jackson*, 92 Tenn. 326. It has been held that, if an express company takes a package for transportation to a point beyond the end of its line, and receive the through charges, it is sufficient to make out a prima facie case of contract to carry and deliver the package to that point; and that the company, in order to avoid liability for loss in such a case, must show a specific contract to carry only to its own terminus, or a settled and uniform rule not to assume liability beyond that point, which rule must be brought home to the consignor, either by express notice, or by a notoriety so general that he may be fairly presumed to have had notice: *St. John v. Express Co.*, 1 Woods, 612. In this case, the plaintiff delivered to the express company in Mobile, Alabama, a package addressed to a consignee in New York, and paid the charges for the entire distance. He took a receipt stating, with respect to the package, that "this company is to forward the same to its agent, nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of the company for such package. The route of the express company extended only to Lynchburg, Virginia, but that company had an arrangement with the Adams Express Company to transport such packages on the latter's route for a proportional part of the freight. The Adams Express Company was held to be the agent of the defendant express company, within the terms of the receipt, and the latter was held answerable for the failure of the former company to deliver the package in New York: *St. John v. Express Co.*, 1 Woods, 612.

*Delivery to Company.*—A delivery of goods to an employé of an express company, who is their wagoner to receive goods throughout the city and deliver them to the company, at its offices, is a good delivery to the company: *Wilmington etc. Mfg. Co. v. Adams Exp. Co.*, 8 Houst. 329. An express company must be treated in good faith in order to charge it as a common carrier and insurer. Concealment, artifice, or suppression of the truth will relieve it of this liability. Therefore, if a package, containing articles of a brittle nature, is delivered to it to be transported from one point to another, and the company is not informed as to what the package contains, in order that a degree of care commensurate with its fragile

character may be used, the company is not answerable, in case of damage, as an insurer: *American Exp. Co. v. Perkins*, 42 Ill. 458. So, if one sends, by a messenger boy, to an express company's office, to be transported to a distant point, a small paper box, tied with a string, and containing a diamond breastpin worth five hundred dollars without giving any notice of its value, the company is not answerable, in case of loss, because the failure, under the circumstances, to notify it of the value of the box, is a fraud upon the company: *Everett v. Southern Exp. Co.*, 46 Ga. 303. A shipper is under no obligation to volunteer any information to an express company as to the value of the property shipped; and the mere fact that he fails to do so, in the absence of any attempt or act to mislead or deceive it as to the value, will not affect the legal liability and responsibility of the company. But the company has a right to inquire as to the value and character of the property, and to have a correct answer. If the company is deceived, or a false answer is given, it is not answerable for any loss; but if the company makes no inquiry, and no artifice is used to mislead it, it is answerable for any loss, however great the value may be: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89; *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90. See, also, *Southern Exp. Co. v. Womack*, 1 Heisk. 256. If no inquiries are made as to value, and a package is received for such price for transportation as is asked with reference to its bulk, weight, or external appearance, the company is answerable for the loss of the package, whatever may be its value: *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90. If the size or appearance of a package fairly indicates that its value is greater than the sum named in a printed receipt limiting the liability of the company to a certain amount, the company is presumed to waive the necessity of stating a value, unless the shipper's attention is called to the condition of the receipt, and the value of the package is required to be given: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140. A bale of cotton is not a "package," as commonly understood, when used in a receipt limiting liability; nor is it an article the value of which is necessary to be stated to enable an express company to understand the extent of its liability, or the care which should be observed in its transportation, or the sum to be charged for its carriage: *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140.

A carrier of letters is not affected by the rule making it the duty of a common carrier to inquire as to value. Good reasons exist for the rule in the case of ordinary packages of goods, which are, from necessity, received personally by the carrier or his servants. But these reasons do not apply to the receipt and transmission of letters, because the letterbox system, and other plans adopted for doing this kind of business, make it almost an impossibility for the carrier to make the inquiry as to the value of the contents of each letter received by him. An express company need not, therefore, make any inquiry as to the value of contents of letters received by it. The sender must inform it of such value in all cases where he desires to hold the company answerable for any loss beyond that of an ordinary letter not containing articles or papers of special value; and an express company, engaged in the transmission and delivery of



letters, inclosed in sealed envelopes, is not liable for any article of special value inclosed therein, or for any loss beyond that of an ordinary letter, unless informed when it receives a letter for transmission that it contains some article or paper of special value. It is immaterial whether the sender of the letter has notice or not of the custom and usage of letter carriers to take special pains and care in the transmission and delivery of valuable letters. His duty is to inform the company, so far as it contains any article of special value: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89. An express company has no right to open a letter or package intrusted to it for transportation, in order to inform itself of the quality or value of its contents: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 80.

A recital, in a bill of lading, that goods received by an express company are in good order when received is not conclusive evidence of the fact: *Mitchell v. United States Exp. Co.*, 46 Iowa, 214. Delivery of property to an express company may be proved, though a receipt was given, without accounting for the receipt: *Southern Exp. Co. v. Womack*, 1 Heisk. 256. An express company is not obliged to accept a package of money for transportation, unless it is properly secured and addressed; and a refusal to count the money, upon the consignor's request, does not create any presumption against the company as to the amount contained in the package: *Fitzgerald v. Adams Exp. Co.*, 24 Ind. 447; 87 Am. Dec. 341. Goods may be delivered unpacked to an express company. But, if they are, in that condition, injured by the mere handling or transportation in a careful manner, the owner must bear the loss. On the other hand, if they are injured by rain, or other cause, for which the company is not excused, it is answerable for the loss. An owner of goods delivering them to an express company is not required to so cover them as to protect them from rain, or wind, or fire not happening by the act of God. The company is an insurer against such injuries: *Klauber v. American Exp. Co.*, 21 Wis. 21; 91 Am. Dec. 452.

*Delivery to Consignee.*—An express company, if there is no special contract limiting its liability, is bound as an insurer of goods received by it for transportation, as against loss occasioned by any cause other than the act of God, the public enemy, or by the conduct of the shipper. It is an insurer of the safe delivery of the goods to the person to whom they are consigned: *Pacific Exp. Co. v. Shearer*, 160 Ill. 215; 52 Am. St. Rep. 324; *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Klauber v. American Exp. Co.*, 21 Wis. 21; 91 Am. Dec. 452; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691. It is the duty of an express company, having a package to deliver, to use due diligence, and to ascertain, by all reasonable inquiry, the residence or place of business of the consignee to whom the package is addressed, and to deliver it to the consignee personally at his residence or place of business: *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Alsop v. Southern Exp. Co.*, 104 N. C. 278; *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49; *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89; *Baldwin v. Amer-*

ican Exp. Co., 23 Ill. 197; 74 Am. Dec. 190; *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Witbeck v. Holland*, 45 N. Y. 13; 6 Am. Rep. 23; *American Exp. Co. v. Stack*, 29 Ind. 27; *American Union Exp. Co. v. Robinson*, 72 Pa. St. 274; *Union Exp. Co. v. Ohleman*, 92 Pa. St. 323. The more appropriate place for the delivery of packages of money and bulky articles is probably at one's own place of business and they should be delivered as soon as the consignees are identified: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Bland v. Southern Exp. Co.*, 1 Hughes, 343.

It is also the duty of an express company to carry the goods to their destination within a reasonable time, and to deliver them as soon as practicable after they reach their destination, within business hours, at the residence or place of business of the consignee, or such other place as he may designate, within a reasonable distance of the place where they are received: *Union Exp. Co. v. Ohleman*, 92 Pa. St. 323; *Alsop v. Southern Exp. Co.*, 104 N. C. 278.

As an express company must deliver to the right person, no circumstances of fraud, imposition, or mistake will excuse the delivery by it of a package to the wrong person: *American Exp. Co. v. Stack*, 29 Ind. 27; *American Exp. Co. v. Fletcher*, 25 Ind. 492; *Houston etc. Ry. Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 116; *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360; especially where there is no identification of the consignee, and the agent making the delivery does not request an identification: *Southern Exp. Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107. A carrier, such as an express company, cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care: *Pacific Exp. Co. v. Shearer*, 160 Ill. 215; 52 Am. St. Rep. 324. Compare *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360. An express company is answerable for delivering a package of money to an impostor who represents that he is the consignee, where the one who sent the money, as directed by telegraph, believed that the telegram was from the person by whom it purported to have been sent, although such impostor telegraphed for the money in the name of the supposed consignee, and a reply to the telegram was delivered to the impostor. The company, without reference to the party who may have ordered the money sent, or who may have telegraphed for it, is bound to deliver to the real person to whom it is consigned: *Pacific Exp. Co. v. Shearer*, 160 Ill. 215; 52 Am. St. Rep. 324. So if, by the fraud of its own agent, an express company induces one to deliver it money to be carried and delivered to a fictitious person, and the company delivers the money to the agent, who embezzles it, the company is answerable to the shipper in an action for money had and received: *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517. But, if the company delivers goods to a person other than the shipper or his consignee, not entitled to them, and such person delivers them to the shipper or consignee, the latter can, in an action for nondelivery, recover only nominal damages: *Rosenfield v. Express Co.*, 1 Woods, 131.

Carriers by vessels and railways are exempt from the duty of personal delivery; but this exemption does not extend to express companies, although availing themselves of carriage by rail. Such a



company is bound to exercise due diligence in finding the consignee, or his place of residence or business: *Witbeck v. Holland*, 45 N. Y. 13; 6 Am. Rep. 23; *American Union Exp. Co. v. Robinson*, 72 Pa. St. 274; and to make an actual delivery, or offer to deliver, to him there, in order to discharge itself of liability as a common carrier, unless it can show that it has performed its engagement, or has been excused from performing it, or been prevented by the act of God or a public enemy: *Baldwin v. American Exp. Co.*, 23 Ill. 197; 74 Am. Dec. 190; *American Exp. Co. v. Baldwin*, 26 Ill. 504; 79 Am. Dec. 389. If the company delivers the goods, or offers to deliver them, to the proper person, at the proper place, and at the proper time, its liability as a common carrier is, from that moment, at an end, and the consignee has no power to prolong that liability, however inconvenient it may be for him to receive the goods. Thus, an offer by an express company to deliver packages to a bank, at half-past five o'clock in the afternoon, in the city of Madison, state of Wisconsin, in the month of August, before the closing of the bank building for the day, constitutes a tender equivalent to a delivery: *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381.

The delivery of a package by an express company must be actual and bona fide, and not merely formal; and if an agent of the company abstract the package while in the act of delivering it, the company is answerable, although a receipt has been signed, and the form of delivery gone through, by the agent's laying the package for a moment out of his hands: *American Exp. Co. v. Haggard*, 37 Ill. 465; 87 Am. Dec. 357. Neither is it a sufficient delivery for the company to leave goods at its public office or on the platform of a railroad depot at the place of destination, unless by express permission, or by a usage so established and well known as to be equivalent to such permission: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Southern Exp. Co. v. Armstead*, 50 Ala. 350. So, if a package of money addressed simply to the consignee by name is delivered by an express company to its agent, at the place of destination, to whose care the consignee's packages have usually been directed, and delivered by him, but the agent converts the money to his own use, the consignee may recover of the express company: *Ela v. American etc. Exp. Co.*, 29 Wis. 611; 9 Am. Rep. 619. If a package is addressed to two persons jointly, a delivery to both consignees, or to either of them for both, is a proper, and the only proper delivery: *Wells v. American Exp. Co.*, 55 Wis. 23; 42 Am. Rep. 695.

An express company cannot relieve itself of the duty of personal delivery, or change its liability from that of a common carrier to that of a warehouseman, by giving notice to the consignee, either by letter or personally, that the package is at the office of the company ready to be delivered to him upon being called for, and that it thereafter remains at the risk of the consignee. He is under no obligation to call at the company's office for the package. His duty is simply to notify the company of his residence, or place of business, or where he may be found, upon receiving the company's notice that the package has arrived, and that the company, after making efforts to find his residence or place of business, has been unable to ascertain either: *Witbeck v. Holland*, 38 How. Pr. 273; 55 Barb. 443.



It may be said, however, that while letters and packages must be delivered to the party to whom they are addressed in person, or to some agent, clerk, or employé authorized by him to receive the same, yet the strictness of the rule is sometimes relaxed under special circumstances, and the rule itself is more or less affected by the established mode or custom of doing business between the company and its customers: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89. Thus, it may be relaxed where there is a well-established custom at railroad way stations, for the express company to give notice, without unreasonable delay, to the consignee, of the arrival of goods and to deliver at the office: *Gulliver v. Adams Exp. Co.*, 38 Ill. 503. So an express company may be discharged of liability for nondelivery in person by giving prompt notice to the consignee of the arrival of a package, at unimportant and out of the way places, and where the business of the company is not sufficient to justify the keeping of a delivery agent: *Baldwin v. American Exp. Co.*, 23 Ill. 197; 74 Am. Dec. 190. Consignors will be presumed to have contracted with reference to a reasonable, known, and well-established custom of an express company in delivering goods and packages at way stations by notice, and depositing them in a safe receptacle. But prompt notice to the consignee must be given to exonerate the company: *Baldwin v. American Exp. Co.*, 23 Ill. 197; 74 Am. Dec. 190; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503. In *Packard v. Earle*, 113 Mass. 280, it was held that such a custom or usage must be proved to have been known to the consignor at the time of making the contract of consignment, in order to be binding upon him. An offer, by a common carrier, to deliver packages to an officer of a corporation, to whom he usually delivers such packages in the usual course of business is sufficient to discharge the carrier from his liability as such. If, therefor, the messenger of an express company takes a package consigned to a bank to the banking-house, and there tenders it to the teller of the bank, who usually receives such packages from the company, the tender relieves the express company from further liability as a common carrier: *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381. A package addressed to a consignee at a particular place, in a certain city, must be delivered by an express company, as it is specially addressed, according to the reasonable usages of the company's business; and a usage of expressmen, whenever packages arrive at their places of business specially addressed to consignees at establishments where many persons sojourn or are employed, to deliver them in the offices or countingrooms of such establishments for the consignees to the clerks there in charge, taking the clerk's receipts therefor, without giving notice to the consignees personally, is a reasonable usage respecting ordinary packages such as a box of clothing of the value of fifty dollars; *Sullivan v. Thompson*, 99 Mass. 259.

A consignor undertakes that there shall be a consignee, or some proper person, at the proper place, at the proper time, to receive the goods shipped by an express company, or, in default thereof, upon due notice, the liability of the carrier as such ceases: *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381. If the consignee is absent, and the company cannot, after diligent inquiry, find him or

ascertain his place of residence or business, its liability as a common carrier is at an end: *American Exp. Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691. So, if the consignee refuses to receive the goods the company's liability, as a common carrier, so far as he is concerned, is at an end. A bank is not excused for refusing to receive a package from an express company that offers to deliver it, by reason of the fact that the offer is made after banking hours, that the vaults are locked, and that the cashier has gone home with the keys thereof: *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381. Compare *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268.

An express company cannot be at the same time both consignee and carrier; and if goods are consigned to an owner, in care of an agent of the express company, a delivery to the agent will probably exonerate the company, but such a rule stands upon the ground of a tacit understanding between the parties: *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49. If an express company receives goods directed in a peculiar manner to the "care" of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods, and the express company discharges itself from liability by delivering the goods to such agent: *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330; 2 Am. Rep. 577.

If goods shipped by an express company are refused by the consignee, the company may return them to the consignor, or if the title has changed after receiving them, or if neither the consignor nor the consignee had title to the property when the company received it, the company may absolve itself from the duties of a common carrier by delivering it to the true owner; but, in delivering to one other than the consignee or consignor, the company does so at its peril, and it must prove that it has delivered them to the true owner. But, where litigation springs up over the consignment, it is not the duty of the company to seek the owner, or to volunteer to protect the contingent future interest of the consignee: *American Exp. Co. v. Greenhalgh*, 80 Ill. 68.

If goods shipped by an express company have not been delivered and have been returned to the place of shipment, the consignor may demand them, and he cannot be refused on the ground that he has not complied with a rule of the company requiring the identification of consignees: *Thomas v. Pacific Exp. Co.*, 30 Mo. App. 86. If the consignor instructs the company not to permit the consignee to examine the goods before delivery and payment of charges, the company's agent is authorized to refuse such examination, and incurs no personal liability by returning the goods to the consignor: *Wiltse v. Barnes*, 46 Iowa, 210. If fruit trees are shipped by express, and the express agent receives a written order from the consignee to "please deliver to the bearer any freight I may have in your possession," this is not such a demand for the trees as to make it the agent's duty to deliver them, or to charge the express company with the damage resulting from a failure to do so, as the order is too uncertain: *Wells, Fargo & Co. v. Windham*, 1 Tex. Civ. App. 267.

After the liability of an express company has ceased, and the goods are still in its custody, its liability therefor is that only of a ware-

houseman: *Southern Exp. Co. v. Holland*, 109 Ala. 362; *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Houston etc. Ry. Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 116; *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 96; *Gibson v. American etc. Exp. Co.*, 3 Thomp. & C. 501; 1 Hun, 387. An express company is bound to use ordinary care for the safekeeping of a package if held by it as a bailee or warehouseman: *American Exp. Co. v. Baldwin*, 26 Ill. 504; 79 Am. Dec. 389; *George C. Bagley etc. Co. v. American Exp. Co.*, 63 Minn. 142; *Marshall v. American Exp. Co.*, 7 Wis. 1; 73 Am. Dec. 381.

*Duty and Liability as to Goods Sent C. O. D.*—When goods are sent by express C. O. D., the liability of the express company as a common carrier is to safely carry the goods to their destination, notify the consignees of their arrival, and to offer delivery upon payment of the amounts, and when such duty is fully performed its liability as a common carrier terminates. If the consignees are not ready to receive and pay for the goods, it is the further duty of the company to safely store, care for, and hold them a reasonable time to enable the consignees to pay and then notify the consignor. The liability of the express company, meanwhile, is that of a warehouseman only: *Hasse v. American Exp. Co.*, 94 Mich. 133; 34 Am. St. Rep. 328; *American Exp. Co. v. Wettstein*, 28 Ill. App. 96. Consignors sending goods by express C. O. D. must expect the express company to retain the goods in order to give the consignees an opportunity to pay for and take them, and in the mean time to store them in its warehouse, and, if the goods are destroyed while so stored, the express company cannot be held to the strict liability of a common carrier, but only as a warehouseman: *Hasse v. American Exp. Co.*, 94 Mich. 133; 34 Am. St. Rep. 328. If the shipper directs a package to be sent C. O. D., and a receipt is given, but which does not show that the package will be sent C. O. D., the retention of such receipt, by the consignor, without objection, until after the lapse of a sufficient time for the package to be delivered to the consignee, is an acceptance, on his part, of the contract of affreightment as evidenced by the receipt, and the express company is not answerable for a failure to collect the money specified on delivery of the package to the consignee: *Smith v. Southern Exp. Co.*, 104 Ala. 387. As to matters of evidence, in cases where goods are shipped, by an express company, C. O. D., see *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *American etc. Exp. Co. v. Wolf*, 79 Ill. 430.

*Delay—Negligence—Damages.*—If goods intrusted to an express company for transportation are damaged in consequence of the company's unreasonable delay, or that of its agents, in forwarding them to their destination, or while they are on the way, or if injury is caused to persons by its delay in delivery, the company is answerable, though the damage was occasioned by an act of God: *Read v. Spaulding*, 30 N. Y. 630; 86 Am. Dec. 426; *Boscowitz v. Adams Exp. Co.*, 39 Ill. 523; 34 Am. Rep. 191; *Goodrich v. Thompson*, 44 N. Y. 324; *United States Exp. Co. v. Root*, 47 Mich. 231. As where dogs, intended to compete in a dog show, though shipped in time, are not delivered until it is too late for them to compete: *Kennedy v. American Exp. Co.*, 22 Ont. App. 278; or where the company does not select the most expeditious route for the shipment of a



corpse: Wells, Fargo & Co. v. Fuller, 4 Tex. Civ. App. 213; or where there has been delay in delivering a package of medicine: Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363; or where perishable goods have been detained and shipped by a later train, in consequence of which they were lost: Cantwell v. Pacific Exp. Co., 58 Ark. 437. If the company agrees to forward goods by a particular steamer, but in fact sends them by a different steamer and they are lost, the company is answerable for the loss. The circumstance that the vessel designated is withdrawn from the route, so that the goods cannot be shipped by her, does not authorize the company to forward "by any other usual, customary, and proper mode of conveyance." It is the company's duty to notify the owner and await his instructions: Goodrich v. Thompson, 44 N. Y. 324. So where goods are refused by the consignee, and the express company agrees to return them to the consignor, but negligently fails to return them in proper time, the consignor is entitled to recover from the company the damages thus occasioned to him: Green v. Pacific Exp. Co., 37 Mo. App. 537. Compare Express Co. v. Jackson, 92 Tenn. 326, as to act of God, and Bank of Water Valley v. Southern Exp. Co., 71 Miss. 741, as to cause of loss where there has been delay in presenting a check sent by express.

*Charges—Lien—Fine.*—It is not the duty of an express company to pay antecedent charges on freight tendered to it for transportation by a connecting express company, even though it is customary to do so: Baltimore etc. R. R. Co. v. Adams Exp. Co., 22 Fed. Rep. 32. If an express company receives a package of money to be carried to the terminus of its line, to be forwarded from there by another company, through whose delay it does not reach its destination until the consignee has left, and the consignor orders its return, the first company has a lien on the package after its return for its own reasonable charges as well as for advances made to the delinquent company: United States Exp. Co. v. Haines, 67 Ill. 137. Charges of express companies, for freight, are sometimes limited by statute to a certain amount, and a statute imposing a forfeiture of not less than one hundred dollars on express companies and others for excessive charges, one-half of which is given to the informer, has been held not to be unconstitutional: Southern Exp. Co. v. Commonwealth, 92 Va. 59.

*Loss of Consignment.*—If goods intrusted to an express company for transportation are lost, the company is answerable if it, or its agent, was negligent: Christenson v. American Exp. Co., 15 Minn. 270; 2 Am. Rep. 122. Thus it must respond in damages if, through its own negligence, or that of its agent, the goods have been destroyed by fire: Purcell v. Southern Exp. Co., 34 Ga. 315; Union Exp. Co. v. Ohleman, 92 Pa. St. 323; Bank of Kentucky v. Adams Exp. Co., 93 U.S. 174; or have been stolen: American Exp. Co. v. Hockett, 30 Ind. 250; 95 Am. Dec. 691; American Exp. Co. v. Baldwin, 26 Ill. 504; 79 Am. Dec. 389. Compare American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394; 8 Am. Rep. 268. It is also answerable for moneys intrusted to it which have been embezzled or stolen by its agent: Southern Exp. Co. v. Bank of Tupelo, 108 Ala. 517; St. John v. Express Co., 1 Woods. 612. If the property is taken, however, after the liability of the

company as carrier has ceased, and it has exercised reasonable care as bailee after the termination of such liability, it is not answerable for the loss: *Adams Exp. Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; as where notice has been given to the consignee of the arrival of a package of money, who fails to avail himself of the opportunity to get it on that day: *Southern Exp. Co. v. Holland*, 109 Ala. 362.

Neither is an express company liable for the loss of a sealed package containing treasury notes, left at its office to be carried to a certain town, where the company is not a common carrier to such town, and the package is not carried to it: *Pitlock v. Wells, Fargo & Co.*, 109 Mass. 452. A city expressman is not answerable for the loss of a trunk after he has delivered it at a railroad depot according to instructions: *Henshaw v. Rowland*, 54 N. Y. 242. Compare *Hebard v. Riegel*, 67 Ill. App. 584.

Although there is a contract limiting liability to a certain amount, an express company is answerable for the full value of goods lost through its negligence, or that of its agents: *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Southern Exp. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369.

*Liability for Acts of Agents.*—An express company is liable for the acts of its agents done within the scope of their employment: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Oderkirk v. Fargo*, 61 Hun, 418; *Southern Exp. Co. v. Boullemet*, 100 Ala. 275. It is answerable for thefts or embezzlement of property committed by them; *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517. Thus, if one is induced through the fraud of an express agent to deliver money to an express company, to be carried and delivered to a fictitious person, and such company receives, receipts for, carries, and delivers the money to such agent, who embezzles it, the sender may recover the amount sent from the express company: *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 99 Ala. 75; 42 Am. St. Rep. 75; *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517. A local agent of an express company may be convicted of embezzling property from it: *State v. Smith*, 57 Kan. 657. An express company is also answerable in damages for a tort committed by its agent in wrongfully abusing, insulting, and maltreating one who goes to the office on business: *Richberger v. American Exp. Co.*, 73 Miss. 161; 55 Am. St. Rep. 522. See *Wright v. Southern Exp. Co.*, 80 Fed. Rep. 85. But the company is not answerable for the act of its agent done without the scope of his employment: *Tuite v. Wakelee*, 19 Cal. 693. An express company is not bound by its agent's knowledge or notice of facts outside of his duties and employment as such agent: *Wells v. American Exp. Co.*, 44 Wis. 342. An express company is, of course, answerable for the failure of its agent to deliver bank notes which the company has undertaken to carry; but the agent's wanton destruction of such notes is a gross violation of the duties for which he was employed, and cannot be imputed to the company as its wrongful act: *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. St. 419; 84 Am. Dec. 499. So, if a consignee has, by agreement, relieved an express agent of his duties, and the agent throws a package of money to him from a moving train, but he does not get it, and it is lost, the company is

not answerable, as the express agent became the consignee's agent as soon as the former had received the money under the arrangement to throw it as described: *Carroll v. Southern Exp. Co.*, 37 S. C. 452. Compare *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330; 2 Am. Rep. 577.

*Actions against Express Companies.*—If an express company loses goods in course of transportation, or, if they fail to arrive at their destination, and the company does not show the manner of their loss, negligence is presumed: *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57. "This rule," says the court in *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57, "is reasonable and just. The carrier alone has it in his power to show what has become of the goods, or why they were not duly delivered. He has the means of tracing them from the moment of their shipment. The shipper has not. He can only show that he delivered them safely to the carrier, and unless the rule in question is applied, the shipper would practically have no remedy, even though his goods had been plundered by the very servants of the carrier. It would very rarely be in his power to make the necessary proof." And where there is room to indulge the presumption, against an express company, that there was an absence of reasonable care, the company cannot excuse itself, even by contract: *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57.

Hence, if an express company fails to deliver property intrusted to it for transportation, at its destination, the burden is on the company to prove that it was not lost or injured whilst in its custody through any fault or neglect on its part: *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Ketchum v. American etc. Exp. Co.*, 52 Mo. 390. Proof of the breakage or other loss of goods in the hands of the company makes a prima facie case of negligence against it: *Ketchum v. American etc. Exp. Co.*, 52 Mo. 390; *Mitchell v. United States Exp. Co.*, 46 Iowa, 214; and, if the company shows that the damage was occasioned by a cause which exempts it from liability, then the owner must prove, before he can hold the company liable, that the damage might have been avoided by the exercise of reasonable skill and attention: *Mitchell v. United States Exp. Co.*, 46 Iowa, 214. In an action against an express company for the loss of money intrusted to it for transportation and delivery, it is only necessary to prove the delivery of the money to the company, and its failure to redeliver it to the consignee: *United States v. Pacific Exp. Co.*, 15 Fed. Rep. 867. An action may be maintained against an express company for the loss of a package of money, although the amount of the loss has already been paid by a third person. The action may still be maintained for the use of such third person: *American Exp. Co. v. Haggard*, 37 Ill. 465; 87 Am. Dec. 257.

If goods are lost or injured while in the custody of an express company, under a special contract, and it does not show how it occurred, negligence is presumed, of course: *American Exp. Co. v. Sands*, 55 Pa. St. 140. The company is answerable, unless it shows affirmatively that the loss was occasioned by a cause within some one of



the exceptions in its receipt or bill of lading: *Southern Exp. Co. v. Moon*, 39 Miss. 822; *United States Exp. Co. v. Backman*, 28 Ohio St. 144. If the company claims immunity under a special contract, the burden is on it to prove, also, that the loss was occasioned without its fault: *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *United States Exp. Co. v. Backman*, 28 Ohio St. 144. If the company, carrying under a special contract, makes a *prima facie* cause of injury without its fault, it is not answerable beyond the contract, unless the shipper shows negligence against the company: *American Exp. Co. v. Sands*, 55 Pa. St. 140. The burden of bringing notice of a change of common-law liability home to the knowledge of the shipper rests upon the company, but, when this is done, the burden of proving negligence or fraud in the company is thrown upon the shipper: *Kallman v. United States Exp. Co.*, 3 Kan. 205. The burden is upon the company, claiming exemption under a special contract, to prove the existence of a fair and reasonable contract: *Adams Exp. Co. v. Guthrie*, 9 Bush, 78; and that the shipper assented to it: *Grossman v. Dodd*, 63 Hun, 324. In an action against an express company, upon a special written contract, the plaintiff cannot rely upon the implied common-law obligation of carriers: *Porter v. Southern Exp. Co.*, 4 S. C. 135; 16 Am. Rep. 762.

The consignee of goods may maintain an action against an express company for their loss, although another person was the owner of them, or was jointly interested in them with him: *Southern Exp. Co. v. Armstead*, 50 Ala. 350. The shipper may also sue for a loss: *Southern Exp. Co. v. Craft*, 49 Miss. 480; 19 Am. Rep. 4; *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487. If one ships his own property to discharge his debt to another, but to the care of a third person, and neither the consignee nor the creditor can be found, and the property is retained by the express company, either the shipper or the creditor may maintain an action for it, and a recovery by either will bar an action by the other: *Thompson v. Fargo*, 58 Barb. 575. The true owner of property shipped by an express company may enforce his right to it as against the consignor, or consignee, or the company, or against the bailor or bailee, whenever he sees fit so to do, before its delivery by the company as directed. "The terms of the contract of consignment, and the directions of the consignor, and the address upon the package are all subject to the *jus tertii* whenever it is sought to be so enforced": *Wells v. American Exp. Co.*, 55 Wis. 23; 42 Am. Rep. 605.

Money paid by an express company under a misapprehension of facts, as for the alleged loss of a bicycle never received by it, may be recovered back: *J. S. Hulse Hardware Co. v. American Exp. Co.*, 65 Ill. App. 596. If state bonds intrusted to it for delivery are lost through its negligence, the owner may recover their value without a statement in his complaint, or furnishing to the company, as a condition precedent, the numbers or dates of the bonds, where no rule of the company requires it: *Martin v. American Exp. Co.*, 19 Wis. 336. In an action against an express company for failure to deliver a package, evidence as to whether the consignee was well known is admissible, on the question of due diligence; *Witbeck v. Holland*, 45 N. Y. 13; 6 Am. Rep. 23. If a package of money, in a

sealed envelope, is received by it for transportation, a recital in a receipt given therefor that the package is "said to contain" a given amount, is not prima facie evidence that the package did, in fact, contain the amount named: *Fitzgerald v. Adams Exp. Co.*, 24 Ind. 447; 87 Am. Dec. 341. It is not necessary, before bringing an action, for money had and received, against an express company, which the shipper was fraudulently induced by an agent of the company to send by it, to return the company's receipt: *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517.

In an action of trover against an express company, if it is shown that the property was in the defendant's possession before the conversion, it is immaterial how it came there, and, in such an action, where the statute provides a method of sale, by the company, of undelivered goods, and it is admitted that such goods were sold, though not in accordance with the statute, the company's rules as to sales of undelivered goods are irrelevant: *Girardeau v. Southern Exp. Co.*, 48 S. C. 421. In the absence of evidence that an express company has illegally converted or fraudulently appropriated property intrusted to it for transportation, fraud cannot be presumed: *Brehme v. Adams Exp. Co.*, 25 Md. 328. Property is not converted by an express company, unless there is a wrongful disposition or withholding thereof. A mere nondelivery is not sufficient to constitute conversion. Neither is a refusal to deliver on demand if the goods have been lost by negligence, or have been stolen, *Magnin v. Dinsmore*, 70 N. Y. 410; 26 Am. Rep. 608.

As a general rule, negligence is a question of fact for the jury, but they cannot, in an action against an express company, find negligence from facts and circumstances not tending to show want of reasonable and ordinary care: *Howard Exp. Co. v. Wile*, 64 Pa. St. 201; *Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516; *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49; *Adams Exp. Co. v. McConnell*, 27 Kan. 238; *Magnin v. Dinsmore*, 56 N. Y. 168. Thus, if there is nothing to excite the suspicion of the company as to the contents of a package carried by it, it is not negligence on its part to introduce the package, if it appears to be damaged, into its place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination and handled; and, if it proves to be a box containing nitro-glycerine, which explodes and injures not only the company's premises but premises of another adjacent thereto, the company is not answerable: *Nitro-Glycerine case*, 15 Wall. 524; 1 Saw. 423. The company, however, is chargeable with actual negligence unless it exercises the care and prudence of a prudent man in his own affairs: *Express Co. v. Kountze*, 8 Wall. 342. The sending of a check, by an express company, in a sealed envelope, and indorsed in blank, instead of to the order of the firm to whom it is sent, constitutes gross carelessness and culpable negligence on the part of the sender, if he is an intelligent business man. And, if the wrong person draws the money on it, the sender ought not to recover: *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; 83 Am. Dec. 89. An express company is answerable if it negligently exposes property to capture by a public enemy, in consequence of which it is captured and destroyed: *Caldwell v.*

Southern Exp. Co., 1 Flip. 85. It is bound to use diligence to prevent such seizure and destruction. It is not essential that the company should be guilty of fraud or collusion with the enemy, or willful negligence to make it liable; ordinary negligence is enough: *Holladay v. Kennard*, 12 Wall. 254. But, if deprived of property by a public enemy without its fault, an express company is not answerable: *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244; *Southern Exp. Co. v. Womack*, 1 Helsk. 256. An express company that receives goods from another company, which has contracted to carry and deliver them, thereby incurs the liability of a common carrier to the owner of the goods, who may, in case of loss, proceed either against the company to which the goods were delivered, or against the company that received them. So, if an express company transfers all its effects to another company, which assumes the former's obligations, the latter is answerable as a common carrier to a third person, who had previously made a contract, for the carriage and delivery of goods, with the former company: *Southern Exp. Co. v. Thornton*, 41 Miss. 216.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MINNESOTA.**

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**BRADLEY v. SANDILANDS.**

[66 MINNESOTA, 40.]

**JUDGMENTS.—A MISNOMER IN THE SUMMONS** of the christian name of one of the plaintiffs does not make the judgment void, though it was entered by default.

**PUBLIC OFFICERS.—THE PRESUMPTION IS,** that a sheriff having an execution did his duty in reference thereto. Hence, though the execution bears an indorsement of filing by the clerk of the court, it will be presumed not to have been returned at that time, if it was the duty of the sheriff to retain it and to thereafter make a sale thereunder.

**EXECUTION, SALE UNDER AFTER THE RETURN DAY.** Where a levy is made upon real property before the return day of an execution, the sheriff may make a sale after such day.

A. A. Harris and Henry E. Harris, for the appellant.

H. S. Lord, for the respondents.

**41 BUCK, J.** The plaintiffs claim title to lot 9 in block 29 in the town of Oneota, now a part of the city of Duluth. This claim is made by them as heirs at law of Catherine Ely, who died April 15, 1881. The defendant claims title to the same property by virtue of a default judgment and an execution sale of the property thereunder. This judgment and execution sale is assailed by the plaintiffs as void, and hence a cloud upon their title. On the trial it was agreed by the parties that the title to the lot in question is in the plaintiffs, unless their ancestors were divested of the same by virtue of certain proceedings in an action brought in the district court of St. Louis county, in this state, in the month of September, A. D. 1871, against Catherine Ely

and her son Frank W. Ely, and the sale of said lot under an execution issued upon a judgment in said action.

It appears that in the year 1867, and for many years thereafter, one Oscar Farrar, and Samuel H. Wheeler were copartners in business at Chicago, as western agents of the Wheeler & Wilson Sewing Machine Company, under the firm name of Farrar & Wheeler. During this time Oscar Farrar had a brother named Arthur Farrar, but who was not a member of the firm of Farrar & Wheeler, but was in their employ as confidential agent and bookkeeper. On October 3, 1869, one Catherine Ely and her son, Frank W. Ely, made and delivered their promissory note in writing to Oscar Farrar, for seven hundred and four dollars and sixty-six cents, due in one year, drawing interest at the rate of seven per cent per annum. Before this note became due, Oscar Farrar sold, indorsed, and transferred the same to his brother, Arthur Farrar, and Samuel H. Wheeler.

On September 26, 1871, a summons, wherein Oscar Farrar and Samuel H. Wheeler were designated as plaintiffs, was served on Catherine Ely and Frank W. Ely, as defendants, in which summons it was stated that a complaint in the action had been filed in the office of the clerk of the district court at Duluth, in the county of St. Louis, and which notified the defendants to answer said complaint within twenty days, or, in case of default in so doing, that plaintiffs would take judgment against them for the sum of seven hundred and four dollars and sixty-four cents, with interest thereon from October 3, 1869, and costs of suit. While, as a matter of fact, <sup>42</sup> the complaint so referred to and filed was not entitled as the summons, yet on September 25, 1871, a complaint against the same defendants was filed in the said clerk's office, wherein the plaintiffs were named as Arthur Farrar and Samuel H. Wheeler; and the cause of action was therein stated to be the making and delivering of said note to Oscar Farrar, its sale and delivery by him to plaintiffs before it became due, for a valuable consideration, its ownership by plaintiffs, and nonpayment, and demanded judgment for the amount of the note. There was no appearance on the part of the defendants, and the affidavit of no answer was entitled the same as the complaint, and the affidavit of disbursements entitled similar to the summons. A judgment by default was entered against the defendants in the action October 17, 1871. The title of the action in the judgment attached to the judgment-roll was originally written "Oscar Farrar," but at some time was changed to "Arthur Farrar." When

it was so changed does not appear. None of the proceedings were ever amended, and execution was issued upon the default judgment November 10, 1871, and placed in the hands of the sheriff of St. Louis county, the same day, who on May 20, 1872, after giving the usual notice, sold the premises to one George Berkleman.

The referee in this action decided in favor of the plaintiffs—that they were the owners of the lot in controversy—and ordered judgment accordingly. From the judgment so entered the defendant appeals.

It is unquestioned that the Elys made the note upon which the action was brought; that there was no fraud, mistake, or want of consideration in the making of the note; and that it had never been paid. It clearly appears that Arthur Farrar and Samuel H. Wheeler actually owned the note at the time when the complaint was filed, and that, as such owners, they were the real parties plaintiff in the action. And it also clearly appears that the summons was personally served upon both the defendants Ely. Neither of them appeared in the action, nor in any manner suggested that there was a misnomer in the summons or complaint, or in any proceedings on the part of the plaintiffs. It is expressly found by the trial court that there was such a person as Arthur Farrar, and that he and Samuel H. Wheeler purchased the note of Oscar Farrar prior to the commencement of this action. There is no dispute as to the name of <sup>43</sup> the other plaintiff being given truly, viz., Samuel H. Wheeler. The Elys permitted the judgment to be taken against them more than twenty-five years ago, and the defendant holds title derived from the purchaser at the execution sale, having purchased in good faith, for a valuable consideration. Upon all these facts appearing, can it be said that the judgment was a nullity? We cannot so regard it.

The cases where there is a defect in the name of the defendant in the summons or notice have but little, if any, application to the one at bar. The proper parties defendant having been designated in the summons and complaint, and the complaint correctly entitled in the name of the real parties in interest, the misnomer in the summons of the christian name of one of the plaintiffs, while the others were given correctly, and all the parties were the identical and real parties in interest, would not render a judgment entered in such proceeding, in the true name of all the parties to the action, a nullity. A summons and complaint such



as appear in this case offered the defendants an opportunity to appear and make a defense before judgment; and, if they declined to do so, a judgment in favor of the plaintiffs necessarily established their right to the relief given, as against the defendants who were actually served. Such a judgment would bar Arthur Farrar and Samuel H. Wheeler, as the real parties in interest, from recovering another judgment upon the cause of action stated in this complaint, although the summons was entitled "Oscar Farrar and Samuel H. Wheeler, Plaintiffs": Freeman on Judgments, sec. 175; McGaughey v. Woods, 106 Ind. 380. The plaintiffs would be bound by such a judgment, because they, as the identical and real persons in interest, voluntarily prosecuted such a proceeding to a final judgment; and the defendants would be bound thereby, because they suffered the judgment to go against them upon notice of such demand by the persons claiming the real interest therein. It seems like trifling with judicial proceedings to remain silent for so many years, with such knowledge, and then seek, upon such a flimsy pretext, to nullify a meritorious judgment thus rendered.

Van Fleet, in his work upon Collateral Attack, section 367, says: "In respect to the name of the plaintiff, it does not seem to me that any mistake in that renders the judgment void. If the creditor's real name is John Smith, and he brings suit in the name of George Jones, the defendant has the opportunity to contest and correct that <sup>44</sup> matter, if he cares to do so. And if the person who sues is a stranger, to whom he owes nothing, he has an opportunity to show those facts."

Certainly the misnomer of the christian name of one of the plaintiffs did not affect or change the cause of action against the defendants, and a correction of this name would have left the same cause of action, and the real parties in interest as plaintiffs. The whole record shows that the writing of the word "Oscar" for "Arthur" was a mere clerical error or misnomer, which, upon application to the court, would have been amended; and the omission to do so did not affect the jurisdiction of the court to render judgment binding upon the defendants: See McGaughey v. Woods, 106 Ind. 380; Cain v. Rockwell, 132 Mass. 193.

We do not attach any importance to the fact that the name of one of the plaintiffs in the title of the action in the judgment attached to the judgment-roll was originally written "Oscar Farrar," and that the same was at some time changed to "Arthur

Farrar"—it does not appear when, or who made the change. It might have been changed before the judgment-roll was finally completed, and, in the absence of any evidence upon the question, such would doubtless be the presumption; and thus the judgment would be valid on its face, under the view we take of the law. This judgment recites the fact that the summons in this action was personally served on the defendants September 26, 1871, and that no copy of any answer or demurrer to the complaint on file had been served on plaintiffs' attorneys as required by the summons. The execution recited the fact that a judgment had been rendered on October 17, 1871, for eight hundred and seventeen dollars and three cents, in the district court of St. Louis county, and state of Minnesota, wherein Arthur Farrar and Samuel H. Wheeler were plaintiffs, and the Elys defendants.

It is contended, however, by the plaintiffs that this execution was filed by the sheriff in the office of the clerk of the district court six days after its issue, and that the clerk placed his filing thereon, and subscribed his name thereon as clerk, and that such filing exhausted the life of the execution, it not having been renewed. It appears that the sheriff levied upon the lot in controversy on November 10, 1871—the day the execution was delivered to him, and upon which he noted such levy.

<sup>45</sup> We do not regard the finding of the referee that the sheriff filed the execution with the clerk on November 16, 1871, as supported by the evidence. There is no such allegation in the complaint, and, though the defendant so alleges affirmatively in his answer, yet this is denied by the plaintiffs in their reply, thus forming a direct issue upon this question, and the evidence fails to establish the fact. While the clerk's indorsement of filing the execution is upon the back thereof, yet it does not appear that the sheriff ever made any return thereon of any kind prior to the time of the execution sale. His name is not on the execution, and there is no evidence that he ever filed it, or consented to its being filed. Certainly, it was not his duty to either make a return or file it at the time of the alleged indorsement of filing by the clerk. Having made a levy on the lot in question, and noted the fact of such levy upon the execution, it would have been his duty to proceed and sell the property before making a return of, or filing, the execution. The presumption is that the sheriff did his duty in this respect: *Knox v. Randall*, 24 Minn. 479.

The record, therefore, fails to disclose any fact which affected or destroyed the life and force of the execution, unless the long

delay in selling the lot after the receipt of the execution, and its levy upon the property in question, had that effect. But this levy was made long before the return day of the execution, and that a sale may be in such case completed by a sale after such day is held in *Barrett v. McKenzie*, 24 Minn. 20; *Knox v. Randall*, 24 Minn. 479; *Spencer v. Haug*, 45 Minn. 231.

Our conclusion is, that the judgment should be reversed, and it is so ordered.

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**PROCESS—DEFECTIVE — JUDGMENT — COLLATERAL ATTACK.**—Defects in a complaint do not authorize a collateral attack upon the judgment: *Note to North Pac. Cycle Co. v. Thomas*, 46 Am. St. Rep. 639. The objection that a christian name of one of the plaintiffs is incorrectly stated in a copy of a citation served on the defendant is properly overruled when it is correctly stated in the petition: *Kirk v. Murphy*, 16 Tex. 654; 67 Am. Dec. 640. The mistake in the surname of a party or any other part of his name is fatal to the validity of legal process, where no power of amendment exists: *Crafts v. Sikes*, 4 Gray, 194; 64 Am. Dec. 62, and note. See *Casper v. Klippen*, 61 Minn. 353; 52 Am. St. Rep. 604, and note.

**EVIDENCE — PRESUMPTION THAT OFFICER HAS PERFORMED DUTY.**—In the absence of any showing, it is presumed that a public officer's action is correctly taken, and that he has complied with all the requirements of law: *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646, and note; *Hogue v. Corbit*, 156 Ill. 540; 47 Am. St. Rep. 232, and note.

**EXECUTION — SALE MADE AFTER RETURN DAY.**—The weight of authority seems to support the validity of sales of real estate made after the return day, where a levy has been made prior to that time: *Monographic note to Young v. Smith*, 76 Am. Dec. 88. The same rule is recognized as to personal property: *Barnard v. Stevens*, 2 Alk. 429; 16 Am. Dec. 733. See, also, *Stein v. Chambliss*, 18 Iowa, 474; 87 Am. Dec. 411; *Moomey v. Maas*, 22 Iowa, 380; 92 Am. Dec. 395, and note.

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## FLINT v. LUHRS.

[66 MINNESOTA, 57.]

**REPLEVIN—JUDGMENT IN FAVOR OF THE HOLDER OF A LIEN OR SPECIAL INTEREST.**—In replevin by the general owner of chattels against one claiming a lien or a special property therein, if the latter recovers, the judgment should be for the return of the property to him or for the value of his special interest, if it is less than the value of the property.

**EXEMPT PROPERTY, LIEN FOR SERVICES THEREON.** The keeper of a livery and boarding stable for horses has a lien upon them for his reasonable charges entitling him to retain possession until his charges are paid, though the property is exempt from execution, and the constitution of the state declares that a reasonable amount of property shall be exempt from seizure and sale for the payment of any debt or liability, the amount of such exemption to be determined by law.

**CONSTITUTIONAL LAW—EXEMPTIONS.**—Though a constitution provides that a reasonable amount of property shall be ex-



empt from seizure and sale, the legislature has power to provide that the keeper of a livery stable shall have a lien on horses boarded by him at the request of their owner, and such lien is enforceable, though the property is by law exempt from execution.

F. M. Card, for the appellant.

Butts & Jaques, for the respondent.

**57** **START, C. J.** This is an action for the recovery of the possession of a horse. The plaintiff alleged that he owned the horse, that he was exempt, and that the defendant unlawfully detained him. The defendant claimed a lien on the horse for keeping him.

The here material facts, as found by the trial court, are as follows: The plaintiff, on November 1, 1894, delivered the horse to the defendant, who was the keeper of a boarding stable for horses, to be kept, supported, and cared for, and requested him so to do. The defendant, pursuant to such delivery and request, supported, kept, and cared for the horse from November 1, 1894, to June 21, 1895, when he was taken from the defendant's possession by virtue of the writ in this action, at which time there was due to the defendant for his keeping, at the monthly charge agreed upon by the parties, the sum of eighty-six dollars and fifty cents, which was the reasonable value of such keeping, and no part of which has ever been paid. The defendant necessarily incurred the further reasonable sum of nine dollars and seventy cents for publishing the notice of sale and other expenses in proceedings taken to enforce his lien on the horse. Such proceedings were not completed, for the reason that **58** after the sale of the horse had been advertised, and the sale cried, the writ herein was served before the sale was in fact made.

As a conclusion of law, the court found that the defendant had a lien on the horse for the keeping, and for his expenses in the sum of ninety-six dollars and twenty cents, and was entitled to the possession thereof until such sum was paid, and directed judgment against the plaintiff for a return of the horse, or for his value, one hundred dollars, in case a return could not be had. Judgment was so entered, from which the plaintiff appealed.

1. The plaintiff makes the point that, in any event, the judgment should have been for the return of the horse, or, in case a return could not be had, for the amount of the defendant's lien on the horse—not for his full value. This is correct. The rule in replevin by the general owner of chattels against one claiming a lien on or a special property therein is, that in case of a recov-

ery by the party claiming such lien or special property, the judgment should be for the return of the property, or for the value of his special interest in case it is less than the actual value of the property: *Dodge v. Chandler*, 13 Minn. 105 (114); *La Crosse etc. Co. v. Robertson*, 13 Minn. 269 (291). Therefore, the judgment in this case is technically erroneous, but we are not justified in reversing it for this error. The evidence as to the amount of the defendant's lien and his expenses in proceedings to enforce it is not before us, hence we must accept the findings of the court as to the amount. It was ninety-six dollars and twenty cents, exclusive of interest and costs in the action, and only three dollars and eighty cents less than the actual value of the property. The case is a proper one, both legally and ethically, for the application of the maxim "*de minimis*."

2. The evidence as to the plaintiff's ownership of the horse, and whether he was exempt, is a part of the record, and it justifies a finding that the plaintiff was the general owner of the horse, and that he was exempt; but the trial court declined to so find, although requested by the plaintiff, except that it did find argumentatively that the plaintiff was the general owner of the property, subject to the defendant's lien. We therefore assume, for the purposes of this appeal, that the plaintiff was the general owner of the horse, and that he was exempt from seizure and sale on execution.

This brings us to the only question in the case entitled to serious consideration. The defendant bases his right to a lien on the horse upon the provisions of General Statutes of 1894, section 6249, which provides that any <sup>59</sup> keeper of a livery or boarding stable for horses or stock who, at the request of the owner thereof, shall keep, support, or care for any such stock shall have a lien thereon for his reasonable charges therefor, and until they are paid may retain the possession of such stock, and sell the same to pay the lien. This statute, by its terms, applies to any and all stock so kept, whether exempt or unexempt from sale on execution. The contention of the plaintiff is, that this statute, in so far as it attempts to give a lien on exempt property, impinges section 12, article 1, of our constitution, which, so far as here material, reads thus: "A reasonable amount of property shall be exempt from seizure and sale for the payment of any debt or liability; the amount of such exemption shall be determined by law." His claim is, that the words "any debt or liability" include any and all liabilities upon which a judgment might or

could be obtained, and especially the liability on which the defendant predicates his lien in this action.

If, as claimed by the plaintiff, the constitution prohibits the legislature from providing by statute, under any and all circumstances, for a lien on property exempt from seizure and sale on execution, it certainly repeals the common law giving a lien on personal property under special circumstances in all cases where such property is exempt from sale on execution. In this respect there can be no distinction between statutory and common-law liens. It follows, then, that if the plaintiff's contention is correct, an innkeeper has no lien on, and may not detain, the personal baggage of his guest until his reasonable charge for keeping the guest is paid, if perchance such property is exempt by law; and that the blacksmith who shoes a horse, or the wheelwright who repairs a wagon, may not detain the horse or wagon until his reasonable charges for his services are paid, if such property is in fact exempt from sale on execution. It is unnecessary to multiply illustrations, for it is obvious that, if the plaintiff's contention is to be conceded, it will result in a radical change in business methods and an overturning of the law of liens as uniformly accepted and acted upon by lawyers and laymen, both before and since the adoption of our constitution.

The constitutional provision here in question prohibits the seizure and sale of exempt property on general execution for the payment of any debt or liability, also the creation solely by statute of any involuntary lien on such property, and its seizure and sale to pay <sup>60</sup> the lien. But it was not intended to, and does not, prohibit the owner of exempt property from voluntarily giving a lien upon any of his exempt property he may see fit, although he may not, it would seem, waive, in advance, the benefit of any exemption law. When he voluntarily gives or creates a lien on his property, the lien may be enforced in such method as the law may provide.

Now, the statute under consideration does not attempt to create an involuntary lien on any property. It simply provides that, if the owner of any horse or stock shall voluntarily deliver it to a livery or boarding stable keeper with the request that such keeper feed, care for, and keep it alive, and the keeper accepts the delivery, and complies with the request, he shall have a lien for his reasonable charges for such keeping. It is the owner of the property that creates the lien by his voluntary act. In the case at bar, the plaintiff might have given the defendant a mortgage on



his exempt horse to secure in advance the defendant's charges for his keeping, but when he delivered the horse to the defendant, with a request to keep and care for him, he gave the defendant a lien on the horse to secure him in the premises just as effectually as if he had given a mortgage to him for the same purpose. The law implied this from the voluntary act of the plaintiff in making such delivery and request.

Our conclusion is, that where a horse, although he is exempt from sale on execution, is delivered by the owner to the keeper of a livery or boarding stable, with a request to feed and care for such horse, he becomes thereby subject to a lien to secure such feed and keeping, as provided by General Statutes of 1894, section 6249, and that such statute is not unconstitutional as to exempt property.

Judgment affirmed.

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**REPLEVIN—FORM OF JUDGMENT.**—A judgment for the plaintiff in an action of replevin must be for the possession or the value of the property in case delivery cannot be had: *Note to Etchepare v. Aguirre*, 25 Am. St. Rep. 186; *Greene v. Lewis*, 85 Ala. 221; 7 Am. St. Rep. 42; also, see *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98;

**THE CONSTITUTIONALITY OF EXEMPTION STATUTES** relating to personal property is discussed in the monographic note to *Rockwell v. Hubbell*, 45 Am. Dec. 251-256.

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## SANDWICH MANUFACTURING Co. v. KRAKE.

[66 MINNESOTA, 110.]

**EXECUTION.**—A MUNICIPAL CORPORATION CANNOT BE GARNISHED or subjected to proceedings supplementary to execution for wages due from it to a member of its fire department.

Christensen & Goebel, for the appellant.

George E. La Clair, H. D. Stocker, and H. D. Stocker, Jr., for the respondent.

<sup>110</sup> **BUCK, J.** The plaintiff recovered a judgment against the defendant for the sum of two hundred and forty-eight dollars and forty-five cents, on certain promissory notes. Subsequently an execution was issued, and returned unsatisfied. On February 25, 1896, an order in supplementary proceedings was issued; and it appears that Krake, the judgment debtor, was in the employ of the city of Minneapolis as a member of the fire department, and that there was due him as wages the sum of fifty-five

dollars from said city over and above all exemption provided by law. Thereupon the trial court ordered that said sum be applied upon the judgment, and that the city treasurer of the city of Minneapolis turn over and deliver to the plaintiff's attorneys the said sum, to be applied toward the satisfaction of the judgment rendered in the case. From the order so made the defendant appeals.

As to whether the defendant, as a fireman or assistant engineer in the fire department of said city, as he appears to be, is technically an "officer," within the strict meaning of that term, we need not consider. <sup>111</sup> If he was an officer, the rule laid down in *Roeller v. Ames*, 33 Minn. 132, would be directly in point, to the effect that the salary of a municipal officer due him from the corporation cannot be reached by proceedings supplementary to execution by the creditors of the officer. This was placed upon the ground that public policy forbids that any legal proceedings upon the part of creditors should be allowed to intervene so as to directly or indirectly interfere with the payment of the salary of a public officer directly to himself. In that case it is further stated: "The reason assigned for this is, in substance, that municipal corporations are auxiliary to the state government; that their officers are public servants, employed to perform public duties; that the public have a right to fill these offices by the selection of the most suitable men; that these officers are usually dependent on their salaries for the support of themselves and families; that the efficiency of their services, or even their remaining in the public service, may depend upon the prompt payment of their salaries, and the certainty that they will receive them when due. Hence, if creditors can step in by any legal proceedings, and prevent the payment of salaries directly to the officers in person, and divert the money to the satisfaction of their claims, the public service would suffer by impairing its efficiency, and perhaps depriving the public of the service of men whom it would be desired to retain. This is not an exemption in favor of the officer, but a rule for the protection of the public. It will be observed that the doctrine rests upon an entirely different reason from that assigned for exempting municipal corporations from garnishment, and is entirely independent of the question whether the corporation or its officers are made parties to the proceedings."

Upon principle, there is no reason why the salary or wages due from a municipal corporation to its fireman should be sub-

ject to be reached by supplementary proceedings, and the salary of an officer be exempt. Testing the right of a fireman to have his wages or salary exempt in such cases, we find that the duty to be performed is one in which the object sought is the protection of property and human life. It is a matter of public notoriety and common knowledge that in recent years, in our large cities, great numbers of buildings are erected, several stories in height, and the lives of their occupants greatly endangered by the difficulty in attempting to escape in cases of fire. The fire departments of our cities have therefore <sup>112</sup> become an important branch of the governmental municipal departments, and the services so performed are a public service for the general welfare of the people. Hence the individual who prepares and fits himself as an efficient fireman and enters upon the discharge of his duties, and who watches and holds himself in readiness for the coming enemy—fire—and labors to stop its ravages, is engaged in a public employment, as much so as though he was a sworn public officer, wearing the badge of official authority. This position is also one of great hardship and personal danger, and so important is it regarded in the city where the defendant resides and is acting as fireman that he is required to take an oath to support the constitution and well and faithfully perform the duties of fireman, before entering upon the discharge of his duties. The great calamity which befell the city of Chicago a few years ago by reason of a terrible conflagration, which destroyed a large part of the city, it is a notable instance of the necessity of an efficient fire department. The destruction of property and great loss of human life by the recent ravages of fire in our own state constitute a sufficient warning that all our fire departments should be made as efficient as can reasonably be possible. Why, then, should not the services of a fireman be deemed as important and as much of a public employment as those of a police or other municipal officer?

Usually, the fireman and his family are dependent upon his wages for support. Promptness and certainty in the payment of these wages may, therefore, be an important element in securing efficient service of the fireman, and his wages should not be diverted from the payment to him personally, but should be exempt from such supplementary proceedings as were instituted in this case. Various acts of the legislature, such as the exemption from taxation of fire-engines and implements used for the extinguishment of fires, and of buildings used exclusively



for the safekeeping thereof, are in line with this policy. It is said that cities should only employ men who are honest enough to pay their debts, but misfortune may overtake the best of men, as it did the defendant in the case at bar; and while the valuable library of the lawyer, as well as a large amount of property of other various classes of people, are exempt from execution, we think it a judicious policy that the fireman, who is protecting the property of the general public as well as endangered human life, <sup>113</sup> should not have his wages diverted from the support of himself and family by supplementary proceedings or levy under execution.

An expression used in the opinion in the case of *Roeller v. Ames*, 33 Minn. 132, to the effect that the court was not inclined to extend the application of this doctrine beyond the salaries of public officers properly so called, is relied upon by the respondent's counsel in support of a different rule than here laid down. The only question in that case was whether the salary of the mayor of the city of Minneapolis could be reached by proceedings supplementary to execution, and it was held that it could not. The office of mayor of a city is purely a public office. As the question here was not there involved, the phrase there used must be deemed as obiter, and not controlling in this case.

The order of the trial court is reversed.

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**GARNISHMENT OF MUNICIPAL CORPORATIONS.**—Municipal corporations are not subject to garnishment proceedings unless expressly made so by statute. The fact that money due from a municipal corporation to the defendant in execution, and sought to be reached by garnishment, has been segregated from the general fund of the corporation, and is held by its treasurer for the specific purpose of paying that particular debt, does not render the corporation subject to garnishment: *Porter etc. Hardware Co. v. Perdue*, 105 Ala. 293; 53 Am. St. Rep. 124, and note. See monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 114-121, on the garnishment of municipalities.

## STATE v. NELSON.

[66 MINNESOTA, 166.]

**MUNICIPAL CORPORATIONS, MILK, REGULATING SALE OF THOUGH NOT PRODUCED WITHIN.**—A municipal corporation may by ordinance require each person desirous of selling milk within its limits to file an application, and procure a license, and submit to inspection the herd from which he supplies his milk, whether it is kept within the city or not, and that a license issue only after the applicant has removed from the herd all animals found to be affected with any infectious or contagious disease. Such ordinance is authorized by a statute empowering municipalities to provide for the inspection of milch and dairy herds kept for the production of milk within the limits of a municipality, and to issue licenses, and to regulate the sale of milk.

**MUNICIPAL ORDINANCE REQUIRING APPLICATION OF THE TUBERCULIN TEST** to milch cows is not oppressive nor unreasonable, though it forbids the sale of any milk from cows which, from such test, appear to be diseased.

F. F. Davis, for the appellant.

David F. Simpson and M. D. Purdy, for the respondent.

**167** MITCHELL, J. Laws 1887, chapter 140, as amended by Laws 1889, chapter 247, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," etc., prohibited, among other things, the keeping of cows for the production of milk for the market in a crowded or unhealthy condition, and the sale of impure or unwholesome milk, and provided for the appointment of a dairy commissioner and assistant commissioner, experts, and chemists, who should have access to all places used in the manufacture and sale of dairy products. Sections 13 and 14 of the amendatory act (Gen. Stats. 1894, secs. 7004, 7005) provided, in substance, that everyone who sold or offered for sale milk in any city or town of two thousand inhabitants or more should obtain a license from the dairy commissioners.

The legislature subsequently enacted Laws 1895, chapter 203, providing that the city council of any city may, by ordinance, provide for the inspection of milk and of dairy herds kept for the production of milk within its limits, and issue licenses for the sale of milk within its limits, and regulate the same, and may authorize and empower the board of health to enforce all laws and ordinances relating to the production and sale of milk for sale or consumption within such city, and to appoint such inspectors, etc., as are necessary for the proper enforcement of such laws and ordinances; and such inspectors, etc., <sup>168</sup> shall

be possessed of such necessary powers within the limits of such city as shall be prescribed by ordinance, but no such ordinance shall conflict with any law of this state. The act further provided that nothing therein contained should affect or interfere with any of the powers and duties conferred on the state dairy commissioner by any law of this state.

In June, 1895, the city council of Minneapolis passed an ordinance to provide for the inspection of milk, dairies, and dairy herds, and to regulate the sale of milk, in the city of Minneapolis. This ordinance is set out in full in appellant's brief as Exhibit C. Its provisions, so far as now material, may be summarized as follows:

Any person desiring a license to sell milk in the city is required to file with the commissioner of health of the city an application therefor, stating, among other things, the location or place from which the applicant obtains the milk, and, if he is not a producer of milk, then the name of the person from whom he obtains his milk, and also requesting the city to inspect his dairy and dairy herd, or the dairy or dairy herd of the person from whom he obtains his milk, for the purpose of carrying out the provisions of the ordinance, a refusal of the applicant to permit such inspection to result in his failure to obtain a license. Upon the filing of such application, the commissioner of health is to inspect the dairy and dairy herd of the applicant or those of the person from whom he obtains his milk, and to cause an examination by the veterinarian of the department of health to be made of every animal producing milk for sale within the city, belonging to the applicant or the person from whom he obtains his milk and "for the purpose of detecting . . . . tuberculosis or any other contagious or infectious disease . . . . the said veterinarian . . . . in making such inspection is hereby authorized to use what is commonly known as the 'tuberculin test' as a diagnostic agency for the detection of tuberculosis in such animal."

The ordinance further provides for the tagging of each animal thus examined and inspected, so as to afford a permanent record of the result as regards the presence or absence of an infectious or contagious disease; that when the applicant or the person from whom he obtains his milk shall have removed from his dairy herd all cows and animals which may be found to be affected with any contagious disease, so that they are no longer used for the production of milk <sup>160</sup> for sale or consumption within the city,



then the commissioner of health shall make a report to the city council concerning such applicant and the condition of the dairy and dairy herd from which he obtains his milk. After these reports are submitted, the city council is, after proper examination, to determine what applicants are entitled to a license to sell milk in the city. It then becomes the duty of the commissioner of health to issue licenses to those determined by the city council to be entitled thereto. The ordinance also provides that no person shall sell, deal in, or dispose of any milk within the city without first having obtained a license so to do in the manner above provided, and imposes a penalty for the violation of any of the provisions of the ordinance.

The defendant, having been convicted of selling milk in the city without first having obtained a license as provided in the ordinance, appealed to this court.

1. The first and second objections urged against this ordinance are virtually one, and may be considered together. The objection is, that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extraterritorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point.

The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits provided for by this ordinance <sup>170</sup> applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to pre-

vent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is, that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city.

2. The objection is urged that the ordinance is oppressive and unreasonable, in that it requires every dairy herd whose milk is desired to be sold within the city to be subjected to the "tuberculin test," which it is claimed is uncertain in its results, and deleterious to the health of the animals. At the present stage of scientific research on this subject it may be a debatable question whether this test has been fully proven, or how far it is as yet merely experimental. There is ample evidence in this case that it is now the generally accepted theory that the presence of consumption or tuberculosis in animals can be detected by this test; also that this is what is called a "germ disease," which may be contracted by eating the flesh or drinking the milk of a tuberculous animal. Upon the evidence we could not say that this provision of the ordinance is oppressive, or that it has not a reasonable tendency to prevent the sale of unwholesome milk within the city.

There are some other objections urged against the reasonableness of the ordinance, but none of them are of sufficient merit to require special notice.

3. It is further urged that the ordinance is repugnant to the Laws of 1887, chapter 140, as amended by the Laws of 1889, chapter 247. The point of this objection is, that the act referred to intrusts to the state dairy commissioner the matter of inspecting dairies and dairy herds and issuing licenses to sell milk in cities or towns of two thousand inhabitants, while, under the ordinance in question, these powers, so far as they relate to dairies and dairy herds whose milk it is proposed to sell in the city, are assumed to be exercised by the city council, whereas the act of 1895 provides <sup>171</sup> that no ordinance shall conflict with any law of the state and that nothing in that act shall affect or interfere with any of the powers and duties conferred on the state dairy commissioner by any law of the state. It must be presumed that the legislature intended to do something when it enacted the law of 1895. But, if counsel's contention is correct,

then the legislature, in the first part of that act, conferred certain powers upon the cities, and then, in the latter part of the same act, took these powers all back. It is clear that the legislature intended to confer on city councils the very powers which have been exercised by the enactment of this ordinance.

Whether, when a city has exercised these powers, it is, as to the sale of milk in such city, a substitute for the license from the dairy commissioner provided for in the act of 1887 as amended in 1889, or whether it is merely supplemental and additional, is a question not involved in this case, for in either view the provisions of the ordinance under consideration are authorized by the act of 1895.

Order affirmed.

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**MUNICIPAL CORPORATIONS—ORDINANCES REGULATING SALE OF MILK—VALIDITY OF.**—If an ordinance prohibiting the sale, or keeping for sale, of milk without a license is clearly within the general powers of a city, it is presumed to be reasonable, and will not be declared void by the courts unless it is shown to be unreasonable: *Littlefield v. State*, 42 Neb. 223; 47 Am. St. Rep. 697, and note. Under a statute authorizing a city to provide for the inspection, and to regulate the sale of milk, a municipal ordinance providing for the inspection of milk offered for sale in such city, forbidding the sale of milk not coming up to the standard or test of purity prescribed, and authorizing an inspector to destroy all milk found by him to be impure according to such standard, is a valid exercise of the police power of the city and state: *Deems v. Mayor*, 80 Md. 164; 45 Am. St. Rep. 339, and note.

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## STATE *v.* HOWARD.

[66 MINNESOTA, 309.]

**INDICTMENT—MISNOMER OF CRIME.**—An error in designating the name of a crime in the commencement of an indictment is an irregularity merely, and the indictment must, nevertheless, be deemed sufficient if the charging part states a public offense.

**IN AN INDICTMENT FOR OFFERING A BRIBE TO A JUROR** it is necessary to state the amount or the thing offered. It is not sufficient to charge that the accused offered, or caused to be offered, a bribe of money or thing of value.

**INDICTMENT, WHEN NOT SUFFICIENT THOUGH IT FOLLOWS THE LANGUAGE OF THE STATUTE.**—If a statute upon which an indictment is based defines the crime by its legal result, and does not contain all the essential elements of the crime, an indictment in the language of the statute is not sufficient.

**IN AN INDICTMENT FOR OFFERING A BRIBE TO A JUROR**, or for causing it to be offered, it is necessary to aver directly the official capacity of the person to whom the bribe was offered, knowledge on the part of the offerer of such capacity, the fact that the thing offered was of value, and to influence the official action of the person to whom it was offered.



W. E. Culkin and Rome G. Brown, for the defendant.

H. W. Childs, George B. Edgerton, and J. T. Alley, for the state.

**309** START, C. J. The defendant demurred to the indictment returned against him by the grand jury of the county of Wright, and filed in the district court of such county on June 16, 1896. The court overruled the demurrer, and certified the case to this court.

**310** Omitting the title, the indictment is in these words:

“John R. Howard is accused by the grand jury of the county of Wright and state of Minnesota, by this indictment, of the crime of bribery of a judicial officer committed as follows:

“On the ninth day of December, A. D. 1895, there was pending for trial in the district court in and for the county of Wright and state of Minnesota, two certain civil cases and actions entitled respectively as follows, to wit, Matthew Czech, plaintiff, against the Great Northern Railway Company, defendant, and Susie Czech, plaintiff, against the Great Northern Railway Company, defendant; and at said time in said county of Wright, the regular general December, 1895, term of said court was in session and each and both of said civil cases and actions were regularly upon the said term calendar for trial, and at said time and place and in said court, each and both of said cases and actions were upon trial together before one of the regular judges of said court and a jury of twelve men, and the name of one of the said jurymen of the said twelve jurymen was then and there one Ernest Otto. That the trial of said cases and actions before said judge and jury began December the 5th, A. D. 1895, and was continued and held during and over December the 9th, 1895, and until December the 10th, A. D. 1895, and that in the matter of the trial of the said cases and actions the said court had full and complete jurisdiction.

“That the said John R. Howard, on the said ninth day of December, A. D. 1895, at the village of Buffalo, in the said county of Wright and state of Minnesota, did wrongfully, unlawfully, and feloniously hire, procure, and cause one O. L. Billings to offer a bribe and money of value to the said jurymen, Ernest Otto, then and there serving on the said jury as aforesaid, with the intent on the part of him the said John R. Howard and him the said O. L. Billings to influence the action, vote, opinion, and decision of him, the said jurymen, Ernest Otto, as a jurymen

in said cases and actions, and to cause him the said juryman, Ernest Otto, to hang the said jury, and, regardless of his, the said Ernest Otto's, convictions in the matters involved in said cases and actions, prevent a verdict being rendered in said cases and actions against said defendant, and that the said O. L. Billings did then and there unlawfully and feloniously offer the said bribe and money to the said juryman, Ernest Otto, for the purpose aforesaid and with the intent aforesaid solely by reason of his being hired, procured, and caused to do so by the said John R. Howard, as aforesaid, the said John R. Howard being then and there in the employ of the said defendant in the cases and actions, and at said time and place engaged in assisting the said defendant in and about the trial of said cases and actions, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota."

The section of the Penal Code upon which the indictment is based reads thus: "Bribery of a Judicial Officer.—A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value <sup>311</sup> of any kind, or any promise or agreement therefor, to a judicial officer, juror, referee, arbitrator, appraiser, or assessor, or other person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereupon, is punishable by imprisonment in the state prison for not more than ten years or by fine of not more than five thousand dollars, or both": Pen. Code, sec. 64; Gen. Stats. 1894, sec. 6348.

1. The crime attempted to be charged in the indictment is "offering a bribe to a juror," or, strictly speaking, causing a bribe to be offered to a juror. In the commencement of the indictment the crime is designated as "bribery of a judicial officer." This discrepancy is the first objection to the indictment urged by the defendant. An error in designating the name of the crime in the commencement of the indictment is an irregularity only. The charging part of the indictment must be alone considered in determining whether the indictment charges a public offense. If it states facts showing the commission of a crime by the defendant, the law determines its name and nature, and neither a misnomer of the crime nor the omission to give it a name affects the validity of the indictment: *State v. Hinckley*, 4 Minn. 261 (345); *State v. Garvey*, 11 Minn. 95 (154); *State v. Coon*, 18 Minn. 464 (518); *State v. Munch*, 22 Minn. 67.

It is further urged that the indictment is insufficient because it does not charge that the person to whom the bribe was offered was a juror. The allegations of the indictment in this respect are sufficient.

2. Two other objections to the indictment are assigned in support of the demurrer meriting more serious consideration. They are: (a) That the indictment does not contain any direct and certain allegation of fact as to the amount, kind, or value of the thing offered as a bribe; (b) That it is not alleged that the defendant knew that the person to whom the offer was made was then a juror.

It is claimed by the state that the indictment substantially follows the statute in alleging what was offered to the juror, and that it is sufficient in all other respects, when tested by the requirements of the statute, which, so far as here material, are, the indictment shall be direct and certain as regards the offense charged, and the particular circumstances thereof, when they are necessary to constitute a complete offense. The indictment is sufficient if it can be understood therefrom that the act charged as the offense is clearly set forth in ordinary and concise language, and that the act constituting the offense <sup>312</sup> is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case. No indictment is insufficient by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits: Gen. Stats. 1894, secs. 7241, 7247, 7248.

These are wholesome and sensible provisions, which should be liberally construed, and indictments sustained where the objection is as to matters of form, and not of substance. But they were not intended to encourage laxity in criminal pleading in matters of substance, but simply to cure "a disease of the law" resulting from the overnicety of courts and their lack of practical sense in giving effect to formal defects in indictments. The statute dispenses with mere formality and technicality, but the requirement that the indictment must be direct and certain as regards the offense, and the particular circumstances thereof, is imperative: *State v. Brown*, 12 Minn. 393 (490); *State v. McIntyre*, 19 Minn. 65 (93). The rule that the charge must be laid positively, and not inferentially by way of recital merely, is not abrogated by the statute.



It is true, as claimed by the state, that an indictment may charge the commission of a statutory offense in the language of the statute without greater particularity when by that means all that is essential to constitute the offense is stated fully and directly: *State v. Comfort*, 22 Minn. 271; *State v. Abrisch*, 41 Minn. 41. But, if the statute does not set forth all of the elements necessary to constitute the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. It must, in such case, go further, and allege with certainty all of the particular facts necessary to bring the case within the intent and meaning of the statute. If the statute simply names the offense, and provides for its punishment, or defines a crime by its legal result, an indictment which simply follows the words of the statute is not sufficient. It must go further, and state directly the facts whence the result comes: 1 *Bishop's Criminal Procedure*, secs. 626-628; *Commonwealth v. Bean*, 11 Cush. 414.

It is apparent from a reading of the statute upon which the indictment in this case is based that it defines the crime of bribing or offering a bribe to a juror by its legal result, and does not contain <sup>313</sup> all of the essential elements of such crime. The essential elements of the crime of offering a bribe to a juror or judicial officer, as necessarily inferred from the statute, include knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered was something of value, and that it was offered with the intent to influence his official action. It is not sufficient to follow the words of the statute, and allege that the defendant offered a bribe to the juror, naming him, with intent (following the words of the statute), or offered him property of value, or money of value, with such intent. On the contrary, it is necessary to allege directly, and not by way of recital or argument, the official character or capacity of the person to whom the offer was made, knowledge that he was such juror or officer by the defendant, the name of the thing offered (if known), the fact that it was of value, and that it was offered with intent to influence the official action of such person: 2 *Bishop's Criminal Procedure*, sec. 126; *People v. Ward*, 110 Cal. 369; *United States v. Kessel*, 62 Fed. Rep. 57; *Brown v. State*, 13 Tex. App. 358; *United States v. O'Neill*, 2 Saw. 481; Fed. Cas. No. 15949; *Commonwealth v. Boynton*, 12 Cush. 499; *Schmidt v. State*, 78 Ind. 41; *State v. Carpenter*, 54 Vt. 551; *Pettibone v. United States*,

148 U. S. 197, 202. Not all of the cases cited are bribery cases, but they all show the necessity of alleging the scienter in similar cases, although the statute does not expressly make it an element of the offense.

The forms of indictments for bribery or offering a bribe of or to judicial or public officers or jurors from Chitty to Bishop contain direct allegations as to the knowledge of the defendant in the premises, the thing given or offered, and its value, and the intent with which the act was done: 3 Chitty's Criminal Law, 696; Bishop on Directions, sec. 247. The usual form of the allegation of knowledge is, that the defendant, "well knowing the premises," or some equivalent; and as to the particular thing (if it was money) given or offered the allegation is either "a large sum of money, to wit, the sum of five dollars," as the case may be, or "the sum of five dollars in money." The latter seems to be the better form.

In every case of bribery or offering a bribe to which we have been referred, or which we have found, the indictment contained substantially both of these allegations as to knowledge of the defendant and <sup>314</sup> the thing given or offered, save two. The exceptions are the cases of Commonwealth v. Chapman, 1 Va. Cas. 138, and State v. Biebusch, 32 Mo. 276. In the first case, the sufficiency of the indictment was not involved. In the second case cited, the indictment was for an attempt to induce by bribery a witness to absent himself from the trial of a cause. It contained an allegation of knowledge on the part of the defendant that the person whom he attempted to bribe was a witness, but it contained no allegations as to the facts constituting the attempt, or as to the money, property, or thing offered as a bribe. The indictment in this respect followed the words of the statute, and it was held to be sufficient on the ground that the crime consisted of the attempt, and the kind or amount of the bribe need not be alleged. The case turned on the construction of the statute, and is not here in point.

Tested by the rules of law which we have stated, it is apparent that the indictment in question is insufficient as to the allegations of knowledge on the part of the defendant and as to the particular thing offered to the juror. As to the first it is urged that the allegations in the indictment to the effect that the defendant was employed in the trial of the cases in which the person to whom the offer was made was a juror, and that he caused the offer to be made with intent to influence his action as such

juror, are sufficient allegations of knowledge on the part of the defendant. But both knowledge and intent are essential elements of the crime, and both should be directly charged, and not argumentatively, or by way of recital: *State v. Cody*, 65 Minn. 121. It was not necessary in this case to allege a description of the money offered to the juror, or that a description thereof was unknown, or that it was current money of the United States; but it was necessary to allege directly some fact, not a conclusion or a result, showing that the money offered was of value. As already stated, the simple allegation that the offer was a given sum of money is all that is necessary. From such an allegation of fact the court can draw the conclusion that the thing offered was of value. A variance between the sum named in the indictment and that proven on the trial would not be material.

We are not to be understood as holding that this indictment would be held insufficient if the objections thereto were made for the first <sup>315</sup> time after verdict. In such case, we would be inclined to resort to all permissible intendments to sustain it.

The order overruling the demurrer must be reversed, and the case remanded to the district court, with direction to enter an order sustaining the demurrer and resubmitting the case to another grand jury, or discharging the defendant, as the court shall be advised. So ordered.

Let the remittitur be sent down at once on the application of the attorney general.

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**INDICTMENT FOLLOWING WORDS OF STATUTE—WHEN SUFFICIENT.**—An indictment for an offense created by statute is generally sufficient if it describes the offense in the language of the statute: *Dickhaut v. State*, 85 Md. 451; 60 Am. St. Rep. 332, and note. But this rule applies only in cases where there is a sufficient description of the offense intended to be created by the legislature: *Sarah v. State*, 28 Miss. 267; 61 Am. Dec. 544. It does not apply in cases where more particularity is required, either from the obvious intention of the legislature or from the application of known principles of law: *State v. Campbell*, 29 Tex. 44; 94 Am. Dec. 251, and monographic note.

**INDICTMENT—DESCRIPTION OF OFFENSE—BRIBERY.**—If the description of the offense charged in an indictment, taking into consideration its nature and the natural and legal import of the terms used in designating it, is such as to convey a certain, clear, and full idea of the offense charged, it is sufficient: *Norton v. State*, 72 Miss. 128; 48 Am. St. Rep. 538, and note. As to what constitutes bribery, see extended note to *State v. Ellis*, 97 Am. Dec. 711-718. For an indictment for bribery held insufficient: *State v. Baller*, 26 W. Va. 90; 53 Am. Rep. 66.



## STATE v. COPELAND.

[66 MINNESOTA, 315.]

**CONSTITUTIONALITY OF LOCAL OPTION LAWS.**—A law cannot be passed to take effect if the voters of the whole state so decide; but where municipalities have a special or particular interest in a law, it may be passed to take effect therein, when accepted by some authoritative body representing the municipality, unless its passage is prohibited by inhibitions of special legislation.

**CONSTITUTIONAL LAW—LOCAL OPTION, MUNICIPAL CHARTERS.**—If a municipal charter is enacted by a legislature to go into effect whenever the common council of any city shall adopt it by a majority vote of all its members, such charter is void, because under it cities of the same class may have different charters, and this is forbidden by that provision of the constitution against special legislation respecting cities.

**CONSTITUTIONAL LAW.—A SPECIAL LAW CANNOT BE MODIFIED OR PARTIALLY** repealed by a special law, if the state constitution declares that the legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same.

Quo warranto, on the relation of persons claiming to be members of the board of public works of St. Paul, requiring respondent, Copeland, to show by what authority he assumed to act as commissioner of the public works of that city. Judgment against the respondent, from which he appealed.

Eller, How & Butler, and H. W. Childs, attorney general, for the relators.

W. L. Chapin, and T. R. Palmer, for the appellant.

**316 CANTY, J.** Laws 1895, chapter 228, is an act general in form, entitled "An act to provide for departments of public works and the making of public improvements in cities of over one hundred thousand inhabitants." It provides that such department shall consist of three branches: 1. An engineering department; 2. A commissioner of public works; and 3. A board of park commissioners. It provides that the head of the engineering department, or city engineer, shall be appointed by the mayor on the second Tuesday in June each even-numbered year, shall hold his office for two years, and shall appoint his assistants and the other employes under him: Sec. 2. It also provides that the commissioner of public works shall be appointed by the mayor on the same Tuesday, and shall hold his office for two years: Sec. 4. This commissioner is to have charge of all improvements which the city council may order. Under the provisions of the statute, he is a standing arbitrator or referee, to

award all damages in condemnation proceedings instituted by him for the city, and to assess a special tax on property specially benefited to pay such damages.

The act provides for the condemnation of property for many different city uses, and provides the mode of procedure. It also provides for the collection of all taxes assessed for benefits which may become delinquent, by proceedings in the district court: Secs. 7-133. It is also provided that the board of park commissioners shall consist of four members, to be appointed by the mayor, whose term of office shall be four years, one to be appointed each year. This <sup>317</sup> board is to have charge of the parks and parkways of the city, and the improvements thereon: Secs. 116-145. Section 146 provides: "This act shall be enforced in any city whenever the common council of any such city embraced within its provisions shall adopt the same by a majority vote of all the members; . . . and all acts and parts of acts in any charter or special law relating to said city shall be thereby, as to said city, repealed in so far as the same relate to the subject matter of this act. . . . All general acts and parts of acts relating to the subject matter of this act, so far as they apply to any city affected by this act, are hereby repealed."

The only two cities in this state having over one hundred thousand inhabitants have been operating under charters consisting of various special laws enacted before the amendments to the constitution prohibiting special legislation were adopted. The city of St. Paul has for many years had a board of public works, provided for by some of these special laws, which board consisted of five members, whose duties were somewhat similar to those imposed upon the commissioner of public works by said Laws of 1895, chapter 228. On July 27, 1895, the common council of St. Paul adopted this act, in the manner provided by section 146 thereof. The mayor appointed the respondent commissioner of public works under the act. But four of the members of the old board of public works (being all of the relators herein, except the attorney general) refused to surrender their offices. A writ of quo warranto was issued herein out of this court, to determine by what warrant the respondent claims the office of commissioner aforesaid.

It is claimed by relators that said chapter 228 is a special law, and contravenes sections 33 and 34 of article 4 of the constitution, as amended, and is unconstitutional, for the reason that it applies only to such cities as adopt it, and may be adopted by

some cities of the class, and not by others, and therefore may not be of uniform operation throughout the state, as required by said amendment. In order that the decision in this case may be fully understood, it is necessary to examine somewhat carefully the question of the constitutionality of local option laws.

It is generally held that a law cannot be passed to take effect if the voters of the whole state so decide, and that such a law cannot be upheld on the theory that it is a law passed to take effect upon a condition. The passing of such a law is merely an attempt to delegate legislative power: *Cooley's Constitutional Limitations*, 120-124. See, also, *State* <sup>318</sup> v. *Young*, 29 Minn. 474. But, except where it is held to be prohibited by constitutional provisions prohibiting special legislation, it is generally held that, where municipalities have a special or peculiar interest in the law, it may be passed to take effect in such a municipality when accepted by some authoritative body representing the municipality: *Cooley's Constitutional Limitations*, 118-120.

Said constitutional amendment provides:

"Sec. 33. . . . The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting, or changing the lines of, any county, city, . . . ; provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same.

"Sec. 34. The legislature shall provide general laws for the transaction of any business that may be prohibited by section 1 of this amendment, and all such laws shall be uniform in their operation throughout the state."

Under these constitutional provisions, is a local option law which gives to each of a class of cities the right to accept or reject certain charter powers constitutional? Is such a general local option law one having a uniform operation throughout the state? How can a law which goes into effect in one city, and does not go into effect in another city of the same class, have a uniform operation throughout the state? It seems to us that the legislature cannot bring about diverse charter powers in different cities by enacting any such local option law which may result in giving different cities different charter powers, unless the same result can be accomplished by a direct, unconditional



law. The mere possibility that all the cities of the class may adopt the law will not save it. It must appear at the time the law is passed that it will have a uniform operation throughout the state; that is, that it will take effect in all cities of the class, and that the class is a proper one. The uniform operation of the law cannot be left to any future contingency.

Let us now consider the nature of local option legislation with reference to this constitutional amendment. There is a vast difference between delegating to some local body the power to adopt a charter and the power to adopt by-laws or ordinances. Suppose, for instance, that a law, general in form, was passed as the charter of the cities of a certain class; that this law created some local body in <sup>319</sup> each city, and gave it generally a large number of designated powers (such as are usually given to such cities by their charters), and authorized this local body to exercise these powers as it saw fit, to designate such other officers as it saw fit, and to define their powers and manner of election or appointment, but provided nothing more in detail. Such a charter, even for the class of larger cities, might be written on four or five pages. But would such a nebulous, skeleton charter be constitutional? Would it not be likely to result in a greater diversity of local laws, be less uniform in its operation, and far less a limitation on the local authorities, than a law, or three or four laws, general in form, which provided three or four different kinds of charters, and left it to each local body to adopt which it saw fit? Yet it is universally conceded that the latter method of providing charters or charter powers is a most palpable evasion of the constitutional provisions prohibiting special legislation. Then, if the latter method of providing city charters is unconstitutional, surely the former method must be. Certainly, the legislature delegates less to the local body when all the provisions of the charter or local law are prescribed, and the local body has only the power to accept or reject it, than when the whole subject is delegated generally to the local body.

Then it is clear that, while the general power to adopt ordinances or by-laws may be delegated to such a local body, no general power to adopt a charter or charter provisions can be so delegated. It also follows that if the legislature can, by a general law, delegate to the local body the general power to adopt by-laws or ordinances on a particular subject, it may, by general law, limit that power by prescribing the provisions which the by-law shall contain and leaving to the local body merely the

power to accept or reject the by-law. Then, whether or not it is constitutional to delegate, by a general local option law, the power to adopt or reject a prescribed charter or charter provision, it is clearly constitutional to delegate in this manner the power to adopt or reject a prescribed by-law or ordinance.

It is a well-established principle that the constitution will be interpreted with reference to the laws and customs prevailing at the time of its adoption, and the distinction between what is a delegation of power to adopt a charter or charter provisions and what is a delegation of power to adopt a by-law or ordinance must be determined largely <sup>320</sup> by ascertaining what had usually been the custom in this state up to and at the time this constitutional amendment was adopted. Undoubtedly, the line of this distinction is somewhat ill-defined. But, if there is a doubt as to the constitutionality of a law, that doubt must be resolved in favor of its constitutionality. Therefore, if, by reference to the practice heretofore prevailing, it is doubtful whether the delegation of power is one to adopt charter provisions, or one to adopt mere by-laws or ordinances, that doubt must be resolved in favor of holding the law delegating such power constitutional.

There is another distinction to be considered, and that is the distinction between what the legislature can practically do and what it cannot. The main reason for the existence of ordinances and by-laws has always been that they regulated local subjects and matters of detail which the legislature could not directly or properly regulate by the passage of permanent laws, either general or special. This old principle must be applied to new instances which will continually arise under the constitutional amendments prohibiting special legislation. The regulation of such matters may always be delegated in general terms to local bodies, and it necessarily follows that more limited powers may be thus delegated by the passage of local option laws for the regulation of these matters. These are distinctions which have sometimes been overlooked in the decisions of those states having similar constitutional provisions. Let us notice some of these provisions and the decisions under them.

The constitution of New Jersey provides that "the legislature shall not pass private, local, or special laws" "regulating the internal affairs of towns [held to include cities] and counties": N. J. Const., amend. art. 4, sec. 7, par. 11. It is held by the courts of that state that those restrictions were not intended to secure uniformity in the operation of laws, and that local option

laws, otherwise general in form, giving to municipalities the right to accept or reject the provisions of the law, are constitutional: *Paul v. Gloucester Co.*, 50 N. J. L. 585; *Warner v. Hoagland*, 51 N. J. L. 62, 72; *In re Cleveland*, 52 N. J. L. 188.

The constitution of Pennsylvania provides that "the general assembly shall not pass any local or special law, . . . regulating the affairs of counties, cities, townships": Pa. Const., art. 3, sec. 7. Under this provision, it is held unconstitutional to delegate to municipalities the <sup>321</sup> right to accept or reject such a local option law: *Appeal of Scranton School Dist.*, 113 Pa. St. 176; *Frost v. Cherry*, 122 Pa. St. 417; *Commonwealth v. Denworth*, 145 Pa. St. 172. Neither the constitution of Pennsylvania nor that of New Jersey expressly requires that the law shall have a uniform operation throughout the state, but the Pennsylvania court regards the prohibition of special legislation as equivalent to a requirement of uniformity, while the New Jersey court does not.

The constitution of Florida provided: "The legislature shall not pass special or local laws in any of the following enumerated cases: . . . regulating county, township, and municipal business; regulating the election of county, township, and municipal officers": Fla. Const., art. 3, sec. 17. "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state": Fla. Const., art. 3, sec. 18. "The legislature shall establish a uniform system of county, township, and municipal government": Fla. Const., art. 3, sec. 21. Under these provisions, the supreme court of that state has held repeatedly that a general local option law for the organization of cities is not a law of uniform operation throughout the state, and therefore unconstitutional: *McConihe v. State*, 17 Fla. 238; *State v. Stark*, 18 Fla. 255; *Ex parte Wells*, 21 Fla. 280.

The constitutions of Iowa and Indiana each prohibit special legislation as to certain matters, and provide that all laws relating to these matters "shall be general and of uniform operation throughout the state": Iowa Const., art. 3, sec. 30; Ind. Const., art. 4, sec. 119. In *Maize v. State*, 4 Ind. 342, it was held that, by reason of such constitutional provisions, a local option law which, by its terms, went into effect, and prohibited the sale of intoxicating liquor, in such townships as adopted it, is unconstitutional. This decision was approved in *Lafayette etc. Ry. Co. v. Geiger*, 34 Ind. 185, 226, 227. The supreme court of Iowa



held likewise, under their constitutional prohibitions, in *State v. Geebrick*, 5 Iowa, 491. In *Dalby v. Wolf*, 14 Iowa, 228, the court sustained a law authorizing the people of the several counties to decide, by a majority vote, whether to restrain hogs and sheep from running at large. The court distinguish the case from that in 5 Iowa, on the ground that "they [the voters] only determine whether a certain thing shall be done under the law, and not whether the law <sup>322</sup> shall take effect," as was provided by the law held invalid in 5 Iowa. From what has been said, it will appear that there is but little in the distinction.

The position of the Indiana and Iowa courts, that a law which can only take effect in each municipality on being adopted by the same contravenes these constitutional provisions, is, in our opinion, undoubtedly correct as applied to a proper matter. But we are of the opinion that the prohibition or licensing of the sale of intoxicating liquors is not such a matter. These constitutional provisions do not require the legislature to do what is impracticable, what they have never been able to do—to effectively regulate the liquor traffic without regard to locality or local sentiment. Experience has demonstrated that prohibition can only be enforced where there is a strong public sentiment behind it, and there is a great difference between the amount of this sentiment in different localities in the same state. Again, this sentiment changes from time to time in the same locality. Then the legislature have a right to say that the question of license or prohibition in each locality is not a matter for them to decide, or a matter to be settled by any statute fixing absolutely or permanently the status in this respect of the whole state or of the different localities.

In the case of *Frost v. Cherry*, 122 Pa. St. 417, the court held a local option fence law, to take effect in each county when adopted by the voters of that county, unconstitutional, as special legislation. It seems to us that the same reason of impracticability applies to a fence law as to a license or prohibition law. It is often utterly impracticable for the legislature to enact an expedient unconditional fence law. Whether the farms should be fenced, and the stock be allowed to run at large, in any particular locality, depends wholly on very complex local conditions, which determine what is for the best interests of the majority of the people of the locality, and is a question which each locality should usually be allowed to settle for itself.

The distinction is between what is properly legislation and

what is properly or necessarily a local by-law. That it is not a delegation of legislative power to grant to some designated body powers which the legislature cannot themselves practically or efficiently exercise is laid down in *State v. St. Paul etc. Ry. Co.*, 38 Minn. 246, and in *Anderson v. Manchester etc. Ins. Co.*, 59 Minn. 182, 194, 195; 50 Am. St. Rep. 400. This distinction between what <sup>323</sup> the legislature can do and what they cannot exists in the nature of things, and has not been eradicated by the constitutional provisions prohibiting special legislation and requiring legislation of uniform operation. It seems to us that several of the courts above mentioned have been misled by ignoring this, and failing to consider that legislation containing a local option provision may in fact be merely a grant of power to each local body to adopt or reject a prescribed by-law, and that, by prescribing the contents of the by-law, the legislature have really granted less power to each local body than if they granted the power to pass any by-law the local body saw fit concerning the particular subject matter.

Let us now proceed to apply these principles to the case at bar. Most of the powers provided for by said Laws of 1895, chapter 228, are distinctively charter powers; that is, they pertain to matters which are almost invariably regulated by city charters, and not by the by-laws passed under such charters. Then, the legislature cannot do indirectly what they cannot do directly; and this act is not constitutional unless the diverse results which may be brought about by the adoption of the act by one city, and the rejection of it by another, can be brought about by direct, unconditional legislation. There are two cities in the state having more than one hundred thousand inhabitants. Can the legislature, by a direct act, provide that said chapter 228 shall apply to the one city, but not to the other? The part of section 146 above quoted provides that, when the act is adopted by any city, "all acts and parts of acts in any charter or special law relating to said city shall be thereby, as to said city, repealed in so far as the same relate to the subject matter of this act." Will not the adoption of this act by one city, and not by the other, have the effect of a partial repeal of a special law by a special law? Clearly, such a special law, partially repealing such a special law, is unconstitutional.

It will be readily seen by anyone familiar with the charter law of the two cities in question that the adoption of chapter 228 by either city will, if the law is valid, repeal a part of each of sev-

eral of the special acts which make up the charter of that city, leaving the other part of each special law to stand, and leaving all of the special laws of the other city on the same subject wholly unaffected. The legislature may, by a general, unconditional law, expressly repeal all special laws so far as inconsistent with it, though this may have the effect <sup>324</sup> of leaving the other part of one or more special laws in force and unrepealed: *State v. Sullivan*, 62 Minn. 283. A general law is also constitutional which does not, by implication or otherwise, repeal the special laws in conflict with it: *State v. Egan*, 64 Minn. 331. The reason of this is, that although the constitutional amendment requires the general law to be uniform in its operation, the amendment does not, as this court construes it, require this uniformity to be brought about immediately. Every step taken must be in the direction of a general law of uniform operation, but the legislature need not at once, or at any one time, take all the steps necessary to bring about this result.

Again, the amendment provides that "the legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same." This allows a special law to be totally repealed by a special law, and, as held in the *Sullivan* case, it allows the partial repeal or modification by a general law of all special laws so far as inconsistent with it. Such a general law is not special legislation at all. But, as before stated, this constitutional provision does not permit a special law to be partly repealed or modified by a special law. Then, the legislature cannot, by a direct, unconditional special law (either included in a general law or enacted alone), repeal the parts of the special laws pertaining to St. Paul, attempted to be repealed by the enactment of chapter 228, and the adoption of the same by the council of that city. As before stated, if the legislature cannot do this directly, by unconditional legislation, they cannot do it indirectly, by legislation containing such a local option provision.

Then, it is our conclusion that chapter 228, aforesaid, is unconstitutional and void; and therefore the claim of respondent, that he holds an official position under it, cannot be sustained.

Let a writ of ouster issue.

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**MUNICIPAL CORPORATIONS—STATUTES AFFECTING—WHEN SPECIAL AND VOID.**—The legislature has power to classify cities and municipal corporations according to population, and then legislate for each class, and the courts will not interfere with the manner of classification. A general law, unlimited as to time in its op-



eration, is not obnoxious to a constitutional inhibition against special legislation because but one city of a class has the population necessary to come within its purview: Monographic note to *State v. Ellet*, 21 Am. St. Rep. 784, 785. See *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106, and note.

**MUNICIPAL CORPORATIONS — CHARTERS — AMENDMENT OF.**—A special municipal charter may be amended by a general law: *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261; 41 Am. Rep. 561, or the proposed amendment may be submitted to the city council or the voters of the city: *Attorney General v. Sheppard*, 62 N. H. 383; 13 Am. St. Rep. 576. See *Cunningham v. Denver*, 23 Colo. 18; 58 Am. St. Rep. 212.

## HULETT v. CAREY.

[66 MINNESOTA, 327.]

**EVIDENCE—DECLARATIONS IN FAVOR OF THE PARTY MAKING THEM.**—If a man executes an instrument in writing and is described therein or in the certificate of acknowledgment thereof as an unmarried man, such writing or acknowledgment is not admissible after his death against one claiming to be his widow for the purpose of proving that he was unmarried.

**EVIDENCE—LETTERS EXHIBITED TO A DECEDENT.**—If a letter is written by a woman in the presence of a man and handed to him to read, and he does read it, puts it into an envelope, and seals it, with the apparent purpose of mailing it, and it is subsequently mailed, and contains a statement to the effect that they are married, it is admissible in evidence as being in effect the joint declaration or statement of both parties.

**WITNESS, LIVING TESTIFYING AGAINST DECEASED — WRITTEN ADMISSIONS.**—The statute of Minnesota declaring that it shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with, or admissions of, a deceased person relative to any matter in issue between the parties, refers only to spoken words. A party may, therefore, be permitted to testify to the writing of a letter in the presence of a deceased and handing it to him to read, and that he read it and subsequently mailed it, if such letter is also produced in evidence, in which event, statements therein contained may be regarded as admissions of the decedent.

**MARRIAGE IS A CIVIL CONTRACT TO THE VALIDITY OF WHICH** the consent of parties able to contract is all that is required by natural law. If the contract is made *per verba de praesenti*, and remains without cohabitation, or is made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary.

**MARRIAGE SECRET.**—An agreement to keep, and the actual keeping secret of a marriage does not invalidate it, although the fact of secrecy may be evidence that no marriage ever took place.

**WILLS—REVOCATION OF.—THE MARRIAGE OF A MAN** did not by the common law revoke a previous will in regard to either real or personal estate.

**WILLS—REVOCATION OF BY MARRIAGE OF A MAN.**—Though a state statute provides in the event of a husband dying intestate his property shall descend to his children and to the lawful issue of any deceased child by right of representation, but if there be no child and no lawful issue of a deceased child, then to the surviving wife, the marriage of a man does not revoke by implication a prior will.

J. L. Washburn, for the appellants.

A. M. Pence, Henry S. Mahon, and C. K. Davis, for the respondent.

**331** MITCHELL, J. Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved, and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 13, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal property, pursuant to the statutes in such case made and provided. On September 13, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside, and that the will be declared not to be the last will and testament of the deceased. In this petition she alleged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage.

Both petitions alleged, and it is admitted, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material on which it was asked that the probate of the will be vacated was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892:

"Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby **332** agree to be husband and wife and to hereafter

live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy."

The probate court decided adversely to the petitioner, and denied both her petitions, whereupon she appealed to the district court in both cases.

Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. When the appeals came on for trial, the district court ordered that the following question be submitted to a jury, viz: "Was the paper purporting to have been made . . . on January 6, 1892, [the marriage contract above set forth,], in fact executed by the late Nehemiah Hulett?" All other issues of law and fact, if any, were reserved to be tried and determined by the court.

Exception is taken by the appellants to the action of the court in submitting this question to a jury. But upon the record no such objection is open to the appellants, because it appears that this is one of the very questions, but better expressed, which they themselves asked to be thus submitted. The court, however, had a right to do this on its own motion: Gen. Stats. 1894, sec. 5361. This practice is as old as courts of chancery themselves, and this is just the kind of a question which those courts were in the habit of sending out to a court of law to obtain the verdict of a jury. So far from trying the issues piecemeal, as counsel claim, this question was really decisive of the only issue of fact in the case, as we shall hereafter show.

The case proceeded to the trial before a jury of the question thus submitted to them. Of course, the contest was over the genuineness of Hulett's signature to the marriage contract. While evidence was introduced as to various collateral facts tending more or less directly to throw light on this question, the bulk of the evidence consisted of the testimony of experts, properly so called, and of persons acquainted with Hulett's handwriting, as to whether his purported signature to the marriage contract was genuine or a forgery. As is usual in such cases, the testimony of these witnesses was very conflicting; but the jury answered the question submitted to them in the affirmative, and it is not claimed, and could not be successfully, that the evidence did not justify the verdict. Hence, unless errors of law, <sup>333</sup> duly excepted to, occurred during the trial of this issue, it must stand as a settled fact, with all its legal consequences, that Hulett and the respond-



ent did execute the marriage contract on January 7, 1892. This disposes of the first assignment of error.

2. Of the various assignments of error relating to the rulings of the court admitting or excluding evidence on the jury trial only three—the ninth, tenth, and fourteenth—are worthy of special notice.

The appellants offered in evidence a mortgage on real estate executed by Hulett alone on May 31, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This was excluded by the court. Counsel then offered to prove by other documents that Hulett, subsequent to the date of the alleged marriage contract, “continued to make conveyances of property and execute legal instruments in which he was designated as a single and an unmarried man, in the same manner as prior to said date.” This offer was likewise excluded. Counsel then offered in evidence a bill of sale executed by Hulett on May 31, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This offer was accompanied by a statement of counsel that this bill of sale was “simply an additional document on the same line.” This offer was also excluded.

In view of the specific offers which thus preceded and followed the general offer, we think the latter must be construed as meaning, not that Hulett described himself as a single man in the body of the instrument, but merely that he was so described in the certificate of the officers who took his acknowledgments. But, however that may be, and without considering the competency of such evidence had it been sought to prove a contract of marriage by “habit and repute,” we are clearly of opinion that it was inadmissible upon the sole issue then being tried before the jury, to wit, whether Hulett executed the express written contract of marriage referred to. Any statements he might have made in these conveyances were certainly no part of the *res gestae*, to wit, the execution of the written contract of marriage. As respects that subject, it seems to us that such evidence would be merely the subsequent self-serving statements of one of the parties.

The fourteenth assignment is, that the court erred in admitting in evidence Exhibit 133, being a letter written July 24, 1892, by the respondent to her sister, in Ohio, containing references to her relations <sup>334</sup> to Hulett; as, for example, where she speaks of him as “my husband” and “your brother Hulett.”

If Hulett had been in no way connected with this letter, so that it would have been the mere statement of the respondent herself, it would have been inadmissible. But the testimony of the respondent was that she wrote it in the presence of Hulett, and then handed it to him to read; that he read it, put it in an envelope, sealed it, and put it in his pocket. She further testified that she subsequently received it back from her sister, to whom it was written. This letter, according to respondent's testimony, was written the day before Hulett's death. The next morning he left home to take the cars to go to Duluth, but died suddenly at the station, while waiting for the train. After his death, a number of letters, addressed, and apparently intended to be mailed, were found in his pocket by the undertaker, who gave them to a nephew of the deceased, who put stamps on them, and posted them. As this letter reached the person to whom it was written, the fair inferences from the evidence are that this was one of the letters found in Hulett's pocket after his death, that the envelope in which it was inclosed was addressed, and that these letters were put in his pocket by Hulett for the purpose of posting them when he reached the city. These facts, if true, amounted to such a recognition of and assent to the statements contained in the letter as to make them, in effect, the joint declarations and statements of both Hulett and the respondent, and therefore competent as his admissions.

It is urged very strenuously by counsel for the appellants that the testimony of the respondent, by which she was thus enabled to connect Hulett with the contents of her letter, impinges upon the statute that it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with or admission of a deceased person relative to any matter at issue between the parties: Gen. Stats. 1894, sec. 5660. It was held in *Chadwick v. Cornish*, 26 Minn. 28, followed in subsequent decisions, that the language of the act refers only to spoken words. If it was a question of first impression, it might admit of discussion whether the statute ought not to be construed in accordance with the views of the late Chief Justice Gilfillan, so as to include any admission of the party, whether by word or act. The peculiar facts of the present case illustrate the fact that admissions by act may often be <sup>335</sup> as much within the mischief aimed at as admissions by spoken words. But, as the narrower construction placed upon the statute has been adhered to and followed for nearly eighteen

years, during which the legislature has not seen fit to amend the law, it is now too late for us to reconsider the question.

None of the exceptions to the charge are well taken or of sufficient substance to require discussion. In fact, the charge was, in most respects, a model one. Instead of merely stating general abstract principles of law (as is often the case), which the average lay juror is usually incapable of correctly applying to the facts of the particular case, the learned judge gave the jury the benefit of a very full, clear, and impartial analysis of the evidence, taking up each important branch of it, and explaining to them its bearing upon the issue which they were to decide. This disposes of all the assignments of error relating to the trial of the issue before the jury.

3. When the other issues came on for trial, by stipulation of the parties all the evidence introduced upon the trial before the jury was deemed as introduced, subject to the same objections and exceptions, in the trial by the court. A small amount of additional evidence having been introduced, both appeals were submitted to the court for its decision. The court thereupon made separate findings of fact and conclusions of law in each appeal. The second finding of fact in each case was to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on January 7, 1892 (the date of the execution of the marriage contract) and on July 25, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on January 7, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals.

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as house-keeper <sup>336</sup> at his farm at Stony Point, some miles out of the city of Duluth. Her testimony is, that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment and cohabited together as husband and wife. But



she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged.

Upon this state of facts the contention of the appellants is, that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although *per verba de præsenti*, must be followed by habit or reputation of marriage—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law.

The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary: 2 Kent's Commentaries, 87; 2 Greenleaf on Evidence, sec. 460; 1 Bishop on Marriage, Divorce and Separation, secs. 218, 227-229. The maxim of the civil law was, "*Consensus non concubitus facit matrimonium.*" The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no <sup>337</sup> time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage: 1 Bishop on Marriage, Divorce, and Separation, secs. 239, 313, 315, 317. See, also the leading case

of *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, which is the foundation of much of the law on the subject.

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place: *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54. The only cases which we have found in which anything to the contrary was actually decided are *Queen v. Millis*, 10 Clark & F. 534, and *Jewell v. Jewell*, 1 How. 219, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

Counsel for appellants contend, however, that the law is otherwise in this state, citing *State v. Worthingham*, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, per verba de praesenti, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents": Citing *Hutchins v. Kimmell*, 31 Mich. 126; 18 Am. Rep. 164. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed per verba de praesenti to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases, where such expressions were used, the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage.

In *State v. Worthingham*, 23 Minn. 528, which was a prosecution for bastardy, the defendant offered, as proof of his marriage to the mother <sup>338</sup> of the child, evidence that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is prob-

ably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it.

The case of *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties and a holding of themselves out as man and wife.

*Sharon v. Sharon*, 75 Cal. 1, 79 Cal. 633, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by solemnization or by a mutual assumption of marital rights, duties, or obligations."

In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do.

4. This brings us to the last and most important question in the case, viz., Was the will of Hulett revoked by his marriage to the respondent?

At common law, the marriage of a woman absolutely revoked her will. The reason usually given was, that a married woman having no testamentary capacity, her will was no longer ambulatory. But the marriage of a man did not revoke his previous will in regard to either real or personal estate. This was not considered such a change of condition as would work a revocation by implication or inference of law. The reason usually given was, that the law made for the wife <sup>339</sup> a provision, independently of the act of the husband, by means of dower. But the marriage and the birth of issue conjointly revoked a man's will, whether of real or personal estate, these circumstances producing such a total change in the testator's condition as to lead to a presumption that he could not intend a disposition of property, previously made, to continue unchanged. The issue, the birth of which would revoke a will, must have been such as could have inherited the property which was the subject of the will, so that the effect of throwing open the property to the disposition of the



law would have been to let in the after-born child or children, for whose benefit alone the implied revocation obtained. The chief reason why marriage and the birth of issue was deemed such a change of condition on part of the testator as would work a revocation of his will was that otherwise his issue, which was the natural object of his bounty, would be wholly unprovided for, differing in that respect from the widow, for whom the law had made provision by means of dower. Hence it seems to have been the rule that marriage and the birth of issue would not produce the revocation of a will, where provision was made by the will itself for the children of the future marriage.

At common law, a married woman could not inherit from her husband. In case of her husband dying intestate, she was not entitled to anything out of his estate except her dower. While by our statutes dower *eo nomine* has been abolished, yet the law makes provision for the widow, independently of the act of the husband, much more liberally than the common law did. She is entitled: 1. To a life estate in the homestead of her deceased husband, free from any testamentary devise or other disposition to which she shall not have assented in writing, and free from all debts or claims against his estate; 2. To hold in fee simple, or by such inferior tenure as the deceased husband was at any time during coverture seised or possessed thereof, one undivided third of all other lands of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which she shall not have assented in writing, but subject, in its just proportion with other real estate, to the payment of such debts of the deceased as are not paid from the personal estate. Of the personal estate of which her husband dies possessed the widow is entitled to all his wearing apparel; his household furniture, not exceeding in value five hundred dollars; other <sup>340</sup> personal property, to be selected by her, not exceeding in value five hundred dollars; a reasonable allowance for her maintenance during administration, which, in case the estate is insolvent, is not to be for more than one year: Gen. Stats. 1894, secs. 4470, 4471, 4477. Such is the provision which the law makes for the widow.

The statute then provides that, where the husband dies intestate, the residue of his estate, real and personal, shall descend and be distributed as follows: 1. To his children, and to the lawful issue of any deceased child by right of representation; 2. If there be no child, and no lawful issue of any deceased child, then to

the surviving wife. It is mainly on this last provision by which the wife may inherit from her husband that counsel for the respondent base their contention that in this state marriage alone will revoke by implication of law the prior will of the husband. Their argument may all be summed up in the proposition that, inasmuch as a widow may now inherit from her husband (which she could not do at common law), therefore marriage alone effects the same change in the condition or circumstances of the husband as was effected under the common law by his marriage and the birth of issue who could inherit. The courts of two or three western states have taken substantially this position: See *Tyler v. Tyler*, 19 Ill. 151; *Morgan v. Ireland*, 1 Idaho, 786; *Brown v. Scherrer*, 5 Colo. App. 255, approved and affirmed in *Scherrer v. Brown*, 21 Colo. 481.

In *Tyler v. Tyler*, 19 Ill. 151, the question was not discussed at any great length, and the weight of that case as authority is somewhat impaired by the fact that in a subsequent case the court placed its refusal to reconsider the question mainly on the ground that the legislature had subsequently enacted that marriage alone, without the birth of issue, revoked a will, and hence that any decision which the court might make would be merely retroactive.

The most able and forcible presentation of the arguments on that side of the question is to be found in the opinion of the Colorado court of appeals in *Brown v. Scherrer*, 5 Colo. App. 255. But, after carefully considering all that has been said on that side, we are compelled to the conclusion that due weight has not been given to the fact that the main reason why, at common law, marriage and the birth of issue were deemed such a change in the condition or circumstances of the husband as would work an implied revocation of his prior will was that <sup>341</sup> otherwise his issue would be wholly unprovided for—a thing which was not to be supposed to have been in the contemplation of the testator; whereas, under our statutes, and, we assume, without special examination, under the statutes of those states in which the decisions cited were rendered, even if the will stands, very liberal provision has been made for the widow, independently of any act of the husband.

There is a prevailing sentiment, often expressed by both courts and textwriters, that marriage alone should be deemed such a change in condition and circumstances as will revoke a prior will. A statute to that effect was passed in England in 1837 (1 Vict.,

c. 26), followed by the enactment of statutes to the same effect in many of the states of the Union. How far this sentiment may have unconsciously influenced the decisions referred to it is impossible to say; but no court has ever assumed to hold on this ground alone, and in the absence of legislation affecting the question, that the common-law rule was abrogated, or so far modified that marriage alone would revoke a will. It is also suggested that the common-law rule had its origin in part in the ancient desire to build up families and family estates, a consideration which has no place in this country. It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in part ceased to exist. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated; as, for example, that pertaining to real estate.

While, undoubtedly, the common law consists of a body of principles applicable to new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the legislature, and not of the courts to modify them. While we do not wish to be understood as intimating that no condition of legislation upon the subject of the rights of married women in the estates of their husbands would effect by implication a change of the common-law rule, yet, in view of the main reason upon which <sup>342</sup> the common-law rule was based—that marriage alone would not, but that marriage and the birth of issue conjointly would, revoke the prior will of a man—and in view of the very liberal provision made by statute for the widow independently of the act of her husband, we are of opinion that the mere fact that she may now, under the statute, in certain contingencies, inherit more from her husband, is not sufficient to warrant us in holding that the common-law rule has been so changed that marriage alone is such a change of condition or circumstances as will work an implied revocation of the prior will of the husband. We should have stated that our statute relating to the revocation of wills is substantially, if not literally, the same as that of 29 Car. II, which has been so generally adopted by the American states: Gen. Stats. 1894, sec. 4430.



The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; for example, as to the power of the probate court to set aside the probate of a will.

In the appeal from the judgment setting aside to the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed. In the other appeal, the judgment setting aside the probate of the will, and adjudging such will to be of no force or effect, is reversed.

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**WITNESSES—COMPETENCY AFTER DEATH OF OTHER PARTY TO CONTRACT.**—The death of the vendor in a parol contract to convey renders the vendee incompetent to testify as to improvements made by him upon the land: *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769. Nor is a surviving wife a competent witness to prove an antenuptial contract with her deceased husband: *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663, and note. See, also, *Matter of Callister*, 153 N. Y. 294; 60 Am. St. Rep. 620.

**MARRIAGE—WHAT CONSTITUTES, AT COMMON LAW.**—Marriage legal at common law consists of a contract and consent per verba de presenti, or, if made per verba de futuro cum copula, the copula is presumed to have been allowed on the faith of the marriage promise, and that the parties at the time of the copula accepted each other as husband and wife: *Hiller v. People*, 156 Ill. 511; 47 Am. St. Rep. 221. See *Simon v. State*, 31 Tex. Crim. Rep. 186; 37 Am. St. Rep. 802, and note.

**WILLS—REVOCATION BY MARRIAGE.**—The marriage of a man did not by the common law revoke his will, whether such will was executed while he was an unmarried man or during the continuance of a previous marriage; and this is the rule in the United States unless expressly abrogated by statute: Monographic note to *Graham v. Burch*, 28 Am. St. Rep. 359, on the revocation of wills. See extended note to *Young's Appeal*, 80 Am. Dec. 516-519.

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## SHEPARD v. BLOSSOM.

[66 MINNESOTA, 421.]

**FIXTURES, NECESSITY OF ATTACHING TO BUILDING.** Though buildings are constructed for the purpose of using machinery therein, and such machinery is placed therein with the intention of making it a permanent part of the plant, it does not become a part of the realty unless it is actually or constructively attached to the building or land.

**FIXTURES, WHAT ARE NOT.**—Band saw machines, a door clamp, a wood-frame sash clamp, an iron top saw machine, all resting on the floor by their own weight, forming a part of an entire plant and placed in a building with intent to be made a permanent part thereof are not, as between mortgagor and mortgagee, fixtures, because they are not attached to the building or land.

**FIXTURES, WHAT ARE—PONDEROUS MACHINES.**—A polishing machine weighing three and a half tons resting on a plat-

form by its own weight and having underneath it, for the purpose of sustaining it, two six-inch posts, reaching from the floor upon which it rests to the first floor of the building, and a large iron veneer press machine, weighing four tons, resting on the floor by its own weight, are, as between mortgagor and mortgagee, fixtures. Ponderous articles, although annexed to the land only by the force of gravitation, if placed there with manifest intent that they shall permanently remain, may be fixtures.

FIXTURES.—MACHINES, THOUGH NOT PONDEROUS, which are blocked to the floor, or held by a countershaft, or braced in front and rear, or braced on one side, as they have some sort of physical annexation, must be treated as fixtures, as between a mortgagor and a mortgagee, where they are placed in a building with intention of making them a permanent part of the plant therein contained.

C. S. Trask, county attorney, and James O'Brien, for the appellant.

Kingsley & Shepherd and Duxbury & Duxbury, for the respondent.

422 CANTY, J. The question involved in this appeal is whether or not, as between the mortgagors and mortgagee, certain portions of the machinery in certain buildings are fixtures. The court below found that there were built on certain city lots in St. Paul, "and permanently attached to the realty, a series of buildings connected and used together, consisting of a two-story frame building, rectangular in form, about fifty feet in width, facing south on Atwater street, and eighty feet in length, designated as the 'main building'; a two-story brick building, twenty-two feet wide by sixty feet long, which stands with the long side next to and attached to the northerly side of said main building. Attached to the northerly side of said brick building is a large drying house and lumber shed and a shavings vault. On the easterly side of said buildings, and ranging parallel therewith, are a warehouse, a glazing room, storage shed, and a molding shed, which last buildings are connected with said main building by an office building. Said buildings were erected by said mortgagors, and designed by them for and used in carrying on the business hereinafter referred to."

The court further found that all of said machinery is a part of the realty, and the appellants, who stand in the shoes of the mortgagors, contend that certain portions of it are not:

It is admitted that the stationary engine and boiler which furnish the motive power, the water heater, the exhaust fan, the air heater, the drying apparatus, the shavings exhaust fan, the shaftings, pulleys, belting, cars, and iron tracks are fixtures. All of

these except the cars are attached to the realty in a very substantial manner. The findings further describe forty different machines and appliances of various kinds (numbered in the findings from 5 to 44), such as emery grinders, sawing machines, molding machines, planers, jointers, mortising machines, turning lathes, and polishing machines, all of which, except fifteen, are bolted to the floors or posts of the building either with bolts or what are termed "lag screws." These fifteen are described in the findings as follows:

"No. 16. An Austin and Eddy pulley mortising machine, resting upon the floor by its own weight, and secured in place by blocking which prevents its moving. It is only adapted and used for mortising pulleys into window frames. No. 17. A Robbins combination saw machine, being a heavy iron machine resting on the floor by its own weight. Its use is to rip and cross-cut lumber. It has a counter-shaft which prevents its moving. No. 18. An S. A. Woods 24-inch shop planer, which rests upon the floor by its own weight, and is blocked in the rear. Used for planing small and short pieces of lumber. 423 . . . . No. 20. A 36-inch Gail and Bumiller band-saw machine, which rests on the floor by its own weight. Used for curved or circular sawing. . . . . No. 26. A Walker panel raiser, being an iron machine resting on the floor by its own weight, but braced in front and rear to prevent its losing its position. Used for raising panels. . . . . No. 30. An S. A. Woods wood-top rip-saw machine, blocked to the floor. Used for cutting lumber lengthwise. No. 31. A Houston No. 3 tenoning machine, blocked to the floor. No. 32. A Rowley and Hermance sash jointer, blocked to the floor at one end. It is adapted for, and used only in, making sash. . . . . No. 34. A Rowley and Hermance door clamp, resting on the floor by its own weight. Only adapted for and used in making doors. . . . . No. 36. A Phillips wood-frame sash clamp, resting on the floor by its own weight. Only adapted for and used in making sash. No. 37. A three-cylinder jointer, set down into the floor and blocked on one side. No. 38. A Rowley and Hermance relishing machine, resting on the floor by its own weight, and being braced on one side, so as not to move in that direction. Only adapted for and used in cutting stiles on doors. No. 39. A 48-inch Berlin polishing machine, weighing three and one-half tons, and resting on a low platform on the floor by its own weight. In order to sustain its weight, two 6-inch posts are placed underneath, reaching from the floor upon which it rests to the first



floor of the building. It is used for polishing flat wood surfaces. No. 40. An S. A. Woods iron-top saw machine, resting on the floor by its own weight. . . . No. 44. In the second story of said building is a large iron veneer press machine, weighing four tons, resting on the floor by its own weight, used for fastening veneer on doors and other woodwork. It was made to order specially for this plant."

The court further found: "All said machinery, . . . including the shafts, pulleys, and belting, engine, boiler, tracks, and cars, and the machines hereinbefore described, were intended to be and were attached to the freehold, and are a part thereof, and were intended to be and are fixtures, and the same are included in said mortgage."

It sufficiently appears that the buildings were constructed for the special purpose for which they were used, that the machinery was all placed in them for the same purpose, and that the whole forms one entire plant. Then the intention to make the machinery a permanent part of the plan sufficiently appears. But, as held in *Farmers' Loan etc. Co. v. Minneapolis Engine etc. Works*, 35 Minn. 543, placing the machinery in position in the building with the intention of making it a permanent part of the plant is not sufficient to make such machinery a part of the realty, unless it is actually or constructively attached to the building or land. The question <sup>424</sup> here involved is a rule of property, and we must follow former decisions. In *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, it is said: "These other tests named, while having an important bearing upon the questions whether there has been annexation, and, if so, its effect, do not, however, do away with the necessity of annexation, either actual or constructive, to constitute a fixture." "Intent alone will not convert a chattel into a fixture." This case is approved in the later case first above cited, which is much in point.

The machines described in findings Nos. 20, 34, 36, and 40, aforesaid, do not appear to have been in any manner attached to the realty except when in operation and the belts were upon the pulleys. We cannot hold this to be a sufficient annexation to make fixtures of these machines.

The machines described in findings Nos. 39 and 44 are very heavy, weighing three and one-half and four tons, respectively. One is sustained by posts put under the floor especially to sustain it, and the other was made to order especially for the plant. We are of the opinion that the finding that these machines are a

part of the realty should be sustained. As said in *Wolford v. Baxter*, 33 Min. 12, 53 Am. Rep. 1: "Ponderous articles, although only annexed to the land by the force of gravitation, if placed there with manifest intent that they shall permanently remain, may be fixtures."

The machines described in the other findings above quoted were all blocked to the floor, or held by a counter-shaft, or braced in front and in rear, or braced on one side. These terms all indicate some sort of physical annexation, and, in our opinion, the finding that these machines are a part of the realty should be sustained.

The order of the court below denying a new trial is reversed so far as to set aside the last finding of fact above quoted and the conclusions of law, so far as such finding and conclusions affect the machines described in said findings Nos. 20, 34, 36, and 40, aforesaid, and as to these machines judgment will be ordered for defendants. In all other respects, the order appealed from is affirmed, and the case is remanded for further proceedings not inconsistent with this opinion.

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**FIXTURES—WHAT ARE, AS BETWEEN MORTGAGOR AND MORTGAGEE—PONDEROUS MACHINES.**—Whatever is placed in a building subject to a mortgage, by a mortgagor, or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation and use, although it may be removed without injury to itself or the building, becomes part of the realty: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235. See *Capehart v. Foster*, 61 Minn. 132; 52 Am. St. Rep. 582, and note; *Muehling v. Muehling*, 181 Pa. St. 483; 59 Am. St. Rep. 674, and note. Heavy machines weighing from one to three tons, fastened by bolts to large timbers laid in the earth, and other machines of less weight bolted to timbers, and adapted and intended for use in carrying on the business of manufacturing bridge iron, are fixtures, and pass by a real estate mortgage in which they are described. It is not material that such machines might have been removed and utilized elsewhere, if they were intended to be used in the business, and such use would have been continued had the business remained prosperous: *Feder v. Van Winkle*, 53 N. J. Eq. 370; 51 Am. St. Rep. 628, and note.

CASES  
IN THE  
SUPREME COURT  
OF  
MISSOURI.

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JONES v. WILLIAMS.

[139 MISSOURI, 1.]

**AGENCY.—EXTRINSIC EVIDENCE** is admissible to prove that one who signed a contract in his own name did so as the agent of another person or of a corporation.

**CORPORATION—CONTRACT MADE IN THE NAME OF A NATURAL PERSON, WHEN BINDING UPON.**—If a contract is made in the name of the owner of the greater part of the stock of a newspaper corporation with another person, to employ the latter and to give him the control of the newspaper, such contract is binding upon the corporation, if it appears from the contract itself, or what was subsequently done under it, that both parties intended the corporation to be bound, and that he who acted on behalf of the corporation had authority to do so.

**CORPORATION—AGENCY OF CHIEF STOCKHOLDER.**—Authority to represent and bind a corporation is not inferable from the fact that the person who assumes to do so owned a large majority of its stock and had the power to select and control its board of directors.

**CORPORATIONS—DIRECTORS, POWER OF TO DELEGATE AUTHORITY.**—The power given by the statutes of Missouri to the directors of corporations to appoint such subordinate officers and agents as its business may require does not diminish their common-law power to delegate their authority. The directors represent the impersonal corporation completely in the business it is authorized to transact, and have power to do, or cause to be done, whatever they as individuals could do if the business were their own.

**CORPORATIONS—AUTHORITY OF OFFICER OR AGENT IMPLIED FROM USAGE.**—If an officer has been permitted to manage the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him.

**CORPORATIONS—AUTHORITY OF THE PRESIDENT.**—The board of directors may invest the president with authority to act as chief executive officer of the corporation. This may be done either by express resolution or by acquiescence in a course of dealing. One dealing with the president in the usual manner and within the powers which the president has been accustomed to exercise, without the dissent of the stockholders, would be entitled to assume that he had actually been invested with those powers.



**CORPORATION—DELEGATION OF CORPORATE POWERS.**—Intrusting the president with the management of the entire business of a corporation is not a delegation of the corporate rights and powers, but is a mere authorization of the president to perform for, and in the name of, the corporation, the business it is authorized to transact.

**CORPORATIONS—IMPLIED AUTHORITY OF AN OFFICER WHO HAS BEEN PERMITTED EXCLUSIVE CONTROL.**—The president of a corporation owning the greater part of its stock, and who has been permitted to control and manage its business as if it were his own private or personal affair, and who in its by-laws is granted control over the board of directors, must be deemed to have authority to act for the corporation, and to make any contract which it has authority to enter into.

**CORPORATIONS—DELEGATION OF AUTHORITY NOT FORBIDDEN BY PUBLIC POLICY OR THE LAW.**—A contract between a newspaper corporation and an individual by which the latter is given control of the paper for a number of years and made its manager and editor, is not against public policy, nor does it divest the corporation of its organic character or of the powers or obligations incident to its existence.

**CORPORATIONS—CONTRACT TO GIVE A PERSON AN OFFICIAL POSITION THEREIN.**—A contract by which a newspaper corporation sells a portion of its stock and stipulates to give the purchaser a position for five years, at a large salary, as editor and manager, and to make him president and a director, is not against public policy, where the object of the contract is the employment of the best expert talent which could be secured for the management of the corporate affairs, and its terms are such as to create an incentive on the part of such manager and editor to promote the welfare of the corporation and to make it successful.

**INJUNCTION—IRREPARABLE INJURY.**—Where the complainant had purchased an interest in a newspaper corporation and entered into an agreement with it by which he was to have the sole management and control for five years, and the board of directors threatened to take from him such management and control, the injury thus threatened cannot be adequately compensated by an award of damages, and must, therefore, be treated as irreparable.

**SPECIFIC PERFORMANCE—CONTRACT FOR PERSONAL SERVICES—WANT OF MUTUALITY.**—Where a contract is made between a newspaper corporation and an editor by which he purchases a portion of its capital stock, and is employed for a number of years, and is given sole control of the paper, and it is agreed that if the profits of the paper shall not be during that period, a sum specified, or if he shall accept any public or political office, or undertake any other business, or should die, resign, or become unable to perform the duties of editor and manager, his salary shall cease, and that he will sell his stock at a valuation to be fixed by arbitration, such contract is not so deficient in mutuality as to deprive a court of equity of jurisdiction to compel its specific performance at his instance.

G. A. Finkelnburg and Boyle, Priest & Lehmann, for the appellants.

James M. Lewis and Judson & Taussig, for the respondent.

<sup>13</sup> MACFARLANE, J. In December, 1891, the "Pulitzer Publishing Company," one of the defendants herein, was incorporated under the laws of the state of Missouri, which provide for

the organization of business corporations. The capital stock of the company is one million dollars, divided into ten thousand shares of one hundred dollars each.

The principal property of this corporation consisted of a daily newspaper published in the city of St. Louis, known as the Post-Dispatch. This paper was established years before by Joseph Pulitzer, who, at the time of the incorporation, was practically the sole owner. <sup>14</sup> The said Pulitzer was an experienced and successful newspaper man, and under his management the Post-Dispatch and its goodwill had become very valuable property. This property was transferred to the corporation in payment for the capital stock. Of the stock Pulitzer gave to his wife eight hundred shares and to his brother in law, William L. Davis, four hundred shares.

By the articles of association it appears that eight shares were subscribed by Charles Gibson, one share by Daniel W. Wood, and one share by Samuel Williams.

At the time of the organization of the corporation Joseph Pulitzer was, and for a number of years prior thereto had been, residing in the city of New York, where he was engaged in the publication of a newspaper known as The World, of which he was also practically the owner.

Prior to February, 1895, the plaintiff, Charles H. Jones, had made a reputation in the south and west as a capable and successful manager and editor of daily city newspapers. He had for a number of years edited a daily paper in St. Louis, and was well acquainted with the people of said city, and of the west generally, and was supposed to know their wants and demands in respect to the character and quality of such papers. At the date of the contract, which is the subject of this litigation, and for some time prior thereto, plaintiff had been employed by Pulitzer as editor of the World.

After considerable negotiation between them, on the sixth day of February, 1895, the following contract was entered into and signed by Pulitzer and plaintiff:

"This agreement made this sixth day of February, in the year one thousand eight hundred and ninety-five, between Joseph Pulitzer, of the city, county, and state of New York, party of the first part, and Charles <sup>15</sup> H. Jones, of the city of St. Louis, state of Missouri, party of the second part,

"Witnesseth: That for and in consideration of the sum of eighty thousand dollars in cash, and the performance by the party of the second part of the conditions hereinafter set forth,

the party of the first part agrees to sell and deliver to the party of the second part, one thousand six hundred and sixty-seven shares of the capital stock of the Pulitzer Publishing Company of St. Louis, Missouri, being one-sixth of the total capital stock of said corporation;

“And whereas the party of the first part is induced to make this sale and enter into the covenants herein contained on the assurances of the party of the second part of his ability to fulfill the covenants and conditions and avoid the penalties hereinafter set forth;

“Now, therefore, it is agreed by and between the parties hereto, and made a part of the consideration for the sale of said one thousand six hundred and sixty-seven shares of stock, that the party of the second part shall be appointed the editor and manager of the Post-Dispatch, a newspaper published in St. Louis, Mo., by the said Pulitzer Publishing Company, for the term of five years from the date hereof, at an annual salary of ten thousand dollars.

“And the party of the first part agrees to elect the party of the second part director and president of the Pulitzer Publishing Company aforesaid, and to give him control and management of said newspaper, the Post-Dispatch, during the above-mentioned period of five years;

“Provided, however, that such appointment and salary shall cease and determine if the party of the second part (shall fail to properly perform the duties of editor and manager aforesaid or) shall at any time during said term accept or occupy any public or political <sup>16</sup> office, elective or otherwise, or engage in any other business of any kind or description, it being covenanted by and between the parties hereto that the party of the second part shall devote all the time, ability, and energy he possesses to the growth, prosperity, and success of said St. Louis Post-Dispatch (and conduct the same with strictest integrity and economy).

“And it is further agreed, by and between the parties hereto, as a test of the ability of the party of the second part to properly manage and edit the said St. Louis Post-Dispatch, that such appointment and salary shall cease and determine in the event that the gross revenues of the Post-Dispatch, from advertising and circulation combined, shall, during the year 1895, be less than the gross revenues from the same sources combined were for the year 1894.

“And it is further agreed, by and between the parties hereto, that said appointment and salary shall cease and determine in the



event that the net profits of the Post-Dispatch for the year 1896 shall be less than the net profits for the year 1893.

"And it is further agreed, by and between the parties hereto, their executors, administrators, and assigns that in case of the death of the party of the second part, his resignation, failure of health, or retirement or inability to perform the duties and labors of editor and manager of the Post-Dispatch at any time within three years from the date of the execution of this contract, the party of the first part shall have the option to repurchase for the sum of eighty thousand dollars, the herein mentioned one thousand six hundred and sixty-seven shares of the stock of the Pulitzer Publishing Company, which in such event the party of the second part agrees to sell and transfer to the party of the first part for the sum of eighty thousand dollars.

"And it is further agreed that in case of the death <sup>17</sup> of the party of the second part, or his resignation, failure of health, retirement, or inability to perform the duties and labors of editor and manager of the St. Louis Post-Dispatch after the expiration of the aforesaid three years and within two years thereafter, the party of the first part shall have the like option to repurchase the aforesaid one thousand six hundred and sixty-seven shares of the stock of the Pulitzer Publishing Company, but in such case the price, instead of being eighty thousand dollars, shall be such sum as may be fixed as the value of said stock by arbitration. Each of the parties hereto, or their executors or administrators, shall name an arbitrator, and, if the arbitrators shall differ in their appraisement, they shall name an umpire, and the decision of said umpire shall be final as to the value of said stock.

"The word 'presidency' in line 9, page 2, stricken out; the words 'shall fail to properly perform the duties of editor and manager aforesaid or,' between lines 10 and 11, page 2, inserted; the words 'and conduct the same with strictest integrity and economy,' end of line 17 and subpage 2, inserted; word 'death,' line 6, page 3, and word 'death,' line 18, page 3, substituted for words 'default' in both places before execution hereof.

"In witness whereof the parties hereto have set their hands and seals the day and year first above written.

"JOSEPH PULITZER,  
"CHARLES H. JONES."

This contract was supplemented by a letter of the same date, from plaintiff to Pulitzer, as follows:

"Jekyl Island, Ga., Feb. 6, 1895.

"Joseph Pulitzer, Esq.

"My Dear Sir: I have to say to you by this letter that I take the office of the Pulitzer Publishing <sup>18</sup> Company under the express agreement that I will agree to the adoption of a set of by-laws to be hereafter framed absolutely forbidding any officer of the company from signing notes or similar obligations of the company; that even contracts involving financial obligations must have the board's approval.

"I further agree to take certificates of stock which shall contain written on their face the words, 'This stock is held subject to the terms and conditions of agreements made of even date'; with the understanding that at the expiration of five years new certificates not so indorsed shall be issued to me.

"Yours very truly,

"C. H. JONES."

On the same day Pulitzer addressed this letter to Mr. Samuel Williams, who was then the editor of the Post-Dispatch:

"Jekyl Island, Ga., Feb. 6, 1895.

"Dear Mr. Williams: I hereby appoint Colonel Charles H. Jones editor and manager of the St. Louis Post-Dispatch. Please notify the others.

Faithfully yours,

"JOSEPH PULITZER, Pres't."

Plaintiff reached St. Louis on the 14th of February, where he was, on that day, accompanied by Mr. Williams, introduced to the employés of the Post-Dispatch and duly installed as editor. Afterward, on March 16th, a stockholders' meeting was held, and Charles H. Jones (plaintiff), Samuel Williams, Florence D. White, Joseph Pulitzer, and S. S. Carvalho were unanimously elected directors. At this meeting the entire stock of the corporation was voted.

At the date of this contract the stockholdings of the corporation were as follows: <sup>19</sup> Joseph Pulitzer, 8,796 shares; Kate Davis Pulitzer, 800 shares; William Leonard Davis, 400 shares; Charles Gibson, 1 share; D. W. Woods, 1 share; F. D. White, 1 share; Samuel Williams, 1 share.

At this time Joseph Pulitzer, William L. Davis, Charles Gibson, Samuel Williams, and Florence D. White were directors. The officers were Joseph Pulitzer, president; Samuel Williams, vice-president; Charles Gibson, secretary.

The stock held by Williams, Gibson, and White was merely nominal, though White had a contract with Pulitzer for two

hundred shares upon which about nine thousand dollars had been paid. Between the date of the contract and the election of directors, Pulitzer had given Carvalho one share of the stock in order to qualify him to act as director.

Plaintiff continued to act as president of the company, and as manager and editor of the Post-Dispatch until August 31, 1895, when, after consultation between directors Pulitzer, Williams, and Carvalho, plaintiff was notified that the policy of the Post-Dispatch should be radically changed on the "silver question" and as to its course regarding the "Stone Democratic faction." No reply having been received to this notice, and no change in the policy of the paper having been made on the seventh day of September, 1895, a second notice was addressed to plaintiff which, after reciting the demands previously made, proceeds: "It would be pleasanter and more agreeable if you pledge prompt and loyal compliance to make these changes at once. If, however, you do not pledge prompt and loyal compliance, a meeting of the board of directors will be called, when the matter will be laid before it, that it may immediately proceed to take action to protect the Post-Dispatch <sup>20</sup> from the danger and folly of its present management."

Three days after the date of this letter plaintiff received the following notice:

"Col. Chas. H. Jones: In accordance with request from majority of the board of directors—Messrs. Williams, Pulitzer, and Carvalho—you are hereby notified that a special meeting of the Pulitzer Publishing Company is called for Saturday, September 21st, in the Post-Dispatch building, St. Louis, Mo., at 12 o'clock noon.

Yours,

"S. S. CARVALHO."

Upon receipt of this notice plaintiff commenced this suit against the corporation and the directors. Pulitzer was never served, nor does he appear. The petition alleged full and faithful compliance with the terms of the contract on the part of plaintiff, and charged that defendant corporation and its board of directors were threatening to interfere with his control and management of the Post-Dispatch, contrary to the terms of said contract, and concludes with the following averments and prayer:

"Plaintiff states that he has no adequate remedy by action for damages; that it is impossible to calculate or estimate the profits which will inure to him, during the coming five years, from his



one-sixth interest in the paper, in view of the rapid and extraordinary increase in the business of the paper during the few months of plaintiff's control. It is also impossible to calculate or estimate the increase in the value of said one-sixth interest of plaintiff at the time of the expiration of said contract, which interest plaintiff was induced to purchase solely by reason of the control of the paper during said term, which was secured to him under the aforesaid agreement, and that it is now evident <sup>21</sup> that such interest will be largely increased in value before the expiration of said term, if plaintiff is not interfered with in the management and control of the paper.

"Wherefore plaintiff says that the acts and doings herein complained of are against equity and good conscience, that defendant Pulitzer, under the cloak of the corporate organization controlled by him and through his dependents therein, will not be permitted to repudiate the aforesaid agreements made and performed in good faith by plaintiff, and that plaintiff is entitled to have said agreement, with his rights of control and management of the Post-Dispatch specially enforced by the restraining orders of this court.

"Plaintiff therefore prays that said agreement of February 6, 1895, hereinbefore set out, and his appointment as editor and manager of the Post-Dispatch be held valid and binding upon the defendant, the Pulitzer Publishing Company, and the individual defendants herein, directors thereof, and that said defendants Pulitzer, Williams, White, and Carvalho, and each of them, and said Pulitzer Publishing Company, and the servants, agents and employes of them, and each of them, be restrained and enjoined by orders of this court from interfering with plaintiff's control and management of the Post-Dispatch, or with his control over the columns or policy of the paper during the term of said contract, and that a temporary injunction be granted pending the hearing of this cause, and for further relief."

A temporary injunction was granted by Judge Wood and upon final hearing before Judge Valliant the injunction was made perpetual. The important portion of the decree is as follows:

"That the defendants Samuel Williams, Florence D. White, S. S. Carvalho, and the Pulitzer Publishing Company, and the servants, agents and employes of <sup>22</sup> them, and each of them, be and are hereby restrained and enjoined from interfering with the plaintiff's control and management of the St. Louis Post-Dispatch and from, in any manner, hindering or impeding him in his du-

ties as editor and manager of said newspaper during the period ending five years from the sixth day of February, 1895, under terms of the contract of February 6, 1895, set forth in the petition herein, or with plaintiff's control over the editorial policy of said newspaper, or with the performance of his duties as editor and manager under said contract, including the employment, direction, or dismissal by him as editor and manager of said newspaper, of any of the subordinates or employes connected with the editorial, news, or business departments of said newspaper; provided, however, that if the net profits of said Post-Dispatch newspaper, under the plaintiff's management, without hindrance or interference by defendants, or either of them or of Joseph Pulitzer, for the year 1896 be less than the net profits of the said newspaper were for the year 1893, or if, at any time during the period ending five years from February 6, 1895, the plaintiff fails to properly perform his duties as editor and manager aforesaid, or accept or occupy any political or public office, elective or otherwise, or engage in any other business, this injunction shall thereby be dissolved; and for the purpose of more certainly carrying into effect this decree, and to preserve the property and rights of the parties to be affected by it, the court reserves the power to appoint a receiver at any time hereafter, to take possession of the property and earnings of said Pulitzer Publishing Company, and administer the same as the court may direct, and until this decree be fully executed; and defendant Joseph Pulitzer not having been served with process herein, and no appearance having been entered on his behalf, the cause is as to him dismissed; and it <sup>23</sup> is further ordered that the plaintiff recover of the defendants Samuel Williams, Florence D. White, S. S. Carvalho and the Pulitzer Publishing Company, his costs and charges in this behalf expended, and that execution issue therefor."

From this decree the defendants appealed. Any additional facts, deemed necessary to a full understanding of the case, will be stated in the opinion.

1. The first objection urged by defendant to the finding and judgment of the trial court is, that the contract was a personal one between plaintiff and Pulitzer, and is not binding on the corporation.

Assuming that Pulitzer had the power to bind the corporation, it sufficiently appears from the contract itself, from what was done under it, and from all the circumstances connected with the transaction, that he intended to bind the company, and that

plaintiff supposed he was dealing with Pulitzer as one who had authority to act for the corporation. The parties who signed the contract unquestionably intended that the corporation should be bound. It can always be shown, in case of natural persons, that one who signed a contract, such as this, in his own name, did so as agent for another. Where authority exists the question is one of intention. The same doctrine is applicable to corporations: *Melledge v. Boston Iron Co.*, 5 Cush. 173; 51 Am. Dec. 59; *American etc. Trust Co. v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *Sparks v. Dispatch etc. Co.*, 104 Mo. 547; 24 Am. St. Rep. 351.

It was not necessary, therefore, that the authority of Pulitzer should have been recited in the contract, or that the corporate name should have been signed to it, or that the official designation of Pulitzer should have been added to his signature.

2. The question then is, Did Pulitzer have authority from the corporation to make the agreement, or was it afterward adopted and ratified by the corporation? <sup>24</sup> In this inquiry we must assume that the contract is one the corporation had the power to make.

It may be said here that authority will not be implied from the mere fact that Pulitzer owned a large majority of the stock, and had thereby power to select and control the board of directors. No stockholder, whatever his interests, can, without authority from the corporation, bind it by contract, however simple. Corporations must act through boards of directors or by their authorized officers and agents. Stockholders, as such, have no implied power to represent the corporation, though, of course, they may be appointed agents, and their voluntary acts may be adopted and ratified and thereby become the acts of the corporation: *Cook on Stocks and Stockholders*, sec. 709; *Hill v. Rich Hill etc. Min. Co.*, 119 Mo. 9; *Pullman etc. Co. v. Missouri Pac. R. R. Co.*, 115 U. S. 587.

This is the general rule, though corporations have been made to answer for the unlawful and fraudulent use made by the stockholders of their stock. Corporate existence may also be ignored in order to circumvent the fraudulent purposes of the shareholders in its organization. But with the few exceptions made by courts of equity, for the purpose of working out the rights and equities of the real parties in interest, corporations can only act through their directors. We are aware of no case in which the performance of a contract, made by a stockholder,



without authority or adoption, has been enforced against the corporation.

3. If the contract then was binding on the corporation when first made, it was because Pulitzer was authorized to make it. If he had no authority from the corporation, then it was his personal contract, and plaintiff must look to him alone for redress.

Counsel argue, with much force, that the directors had no power to delegate to an executive officer, the authority to place its property and business under the <sup>25</sup> absolute control of a third party, and thereby to divest themselves of the duties which the law has imposed upon them.

It is true the statutes of Missouri require that the property and business of a corporation, such as this one, shall be controlled and managed by directors, but it also authorizes them "to appoint such subordinate officers and agents as the business of the corporation may require": Rev. Stats. 1889, sec. 2508.

A corporation may be described as being an artificial being existing only in contemplation of law; a legal entity, a fictitious person, vested by law with the capacity of taking and granting property and transacting business as an individual. It is composed of a number of individuals authorized to act as if they were one person. The individual stockholders are the constituent or component parts, through whose intelligence, judgment, and discretion the corporation acts. The affairs of a corporation cannot, in many cases, be conveniently conducted and managed by the stockholders, for they are often numerous and widely separated. Yet they, in reality, compose the body corporate. "It is their acts, when done in the manner prescribed in the constitution of the corporation, that are, properly speaking, acts of the corporation": Taylor on Corporations, sec. 50; Morawetz on Corporations, sec. 1.

At common law, the power to have a board of directors was inherent in the corporation. The statute of Missouri, requiring the business and property of a corporation to be managed and controlled by directors, is but an affirmance of the common-law power. So likewise, the directors have the power, without statutory authority, to delegate to officers, agents, or executive committees the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion. Thus authority to <sup>26</sup> manage the business of railroad corporations, insurance companies, banking institutions, and other corporations having large and complicated business

interests, is usually delegated by the directors to agents, often, but not necessarily, officers of the corporation. These agents, or managing officers, have incidental power to employ all assistants and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors is not necessary in order to confer the authority.

The power expressly given by statute to the board of directors "to appoint such subordinate officers and agents as the business of the corporation may require" does not limit or diminish the common-law power to delegate authority. The directors represent the impersonal corporation completely in the business it is authorized to transact, and have the power to do, or cause to be done, whatever they as individuals could do if the business were their own. They act as the corporation itself, as well as under a delegated authority from it: Beach on Private Corporations, sec. 227. The power of directors to delegate authority to officers and agents has been recognized by this court in many cases: *Western Bank v. Gilstrap*, 45 Mo. 419; *Sparks v. Dispatch etc. Co.*, 104 Mo. 531; 24 Am. St. Rep. 351; *Moore v. Gaus etc. Mfg. Co.*, 113 Mo. 106; *First Nat. Bank v. North Missouri etc. Co.*, 86 Mo. 125.

"If directors, or other corporate agents, do an act which is not beyond the scope of the corporate powers, the question whether the act is binding on the corporation and all persons interested in the corporate enterprise may be usually solved by the ordinary rules of agency": Taylor on Corporations, sec. 193; *Hatch v. Coddington*, 95 U. S. 48; *New York etc. R. R. Co. v. Dixon*, 114 N. Y. 85.

It is said by Gantt, J., in *Moore v. Gaus etc. Mfg. Co.*, 113 Mo. 106: "The power of an agent or officer of a corporation to bind his principal is governed by the law of <sup>27</sup> agency, and, where an officer has been permitted to manage all the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him."

The president of a corporation is its executive officer. Within the scope of his duties, as the head of the corporation, he has the power to act without direct authority of the directors. Indeed, it has been held that "the president being the legal head of the body, when an act is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body": *Smith v. Smith*, 62 Ill. 493.

However that may be, "there can be no doubt," says Morawetz, "that the board of directors may invest the president with au-

thority to act as chief executive officer of the company. This may be done either by an express resolution, or by acquiescence in a course of dealing. A person dealing with the president of a corporation in the usual manner, and within the powers which the president has been accustomed to exercise without the dissent of the directors, would be entitled to assume that the president had actually been invested with those powers": Morawetz on Corporations, sec. 538.

This corporation was organized for pecuniary profit and gain. For the purposes contemplated, the entire business and property may be intrusted to certain officers and agents with authority to manage and control the same. Certain acts, which do not pertain to the business, must be performed by the stockholders or directors, such as increasing the capital stock, declaring dividends, etc.

Intrusting the president with the management of the entire business is not the delegation of corporate rights and powers, but is a mere authorization of the president to perform, for and in the name of the corporation, the business it is authorized to transact.

<sup>28</sup> 4. One who reads the record in this case cannot for a moment doubt that Pulitzer had all the authority the stockholders and directors could confer upon him. He established, owned, and managed the Post-Dispatch years before the present corporation was organized. Employés of Pulitzer, who worked on the Post-Dispatch, had, on account of their fidelity and capacity, been advanced and promoted to honorable and responsible positions. These were given nominal interests, and were made directors. At the organization Pulitzer subscribed for eight thousand seven hundred and ninety shares, and gave to his wife eight hundred shares and to his brother in law four hundred shares, Gibson three shares, Samuel Williams one share, and David W. Wood one share. By the articles of association Pulitzer was made president and his brother in law Davis secretary. Williams and Gibson were also made directors. No regular election of officers occurred afterward until April, 1894, at which the same directors and officers were elected, except that White, also an employé, was elected director in place of Gibson.

A certificate of incorporation was issued December 28, 1891. About the 1st of January, 1892, a stockholders' meeting was held, at which by-laws were adopted by a unanimous vote of all the stock.



The first and second of these provided:

"The president and board of directors shall govern the company, and, when acting with the consent of a majority in interest and numbers of the stockholders, shall have supreme control and power over all its affairs, business, and property, and may regulate or dispose of the same as they see fit. They shall have full power to make all contracts, and generally carry on all the business of the company, or any newspaper published by it. They shall appoint all officers and agents <sup>29</sup> of the company, either directly or through the president, and fix the salaries of the same.

"The executive power of the company is vested in the president, but in his absence, refusal, or inability to act he may authorize in writing the vice-president to act in his place."

The board of directors met on the thirteenth day of January, 1892, when the president was expressly authorized to carry out and complete the purchase of all the property of the "Dispatch Publishing Company." For this property the shareholders received stock in the present company, by which the entire capital stock was paid. So Pulitzer, as president, was authorized to buy from himself as stockholder the property of the Dispatch Publishing Company. From that day to the 11th of July, 1894, there were only three meetings of the directors. At two of these officers were elected, and at the third the secretary was given power to receive and receipt for money.

An analysis of the by-laws shows the absolute control Pulitzer reserved over the board of directors. Though himself and the two employes on the Post-Dispatch composed a majority of the board, and though these two directors were his most trusted friends, yet the power of the directors could be paralyzed at the will of the majority in interest of the stockholders which he represented. The executive power of the company was vested in him, and even in his absence, refusal or inability to act, his written authority was necessary in order for the vice-president to act in his place. He is given power to appoint all officers and agents of the company, and "to fix the salaries of the same."

Pulitzer admits, in his deposition, that he told Jones in effect that independent boards of directors <sup>30</sup> were "meddlesome," and that a majority of the stock carried with it a "boss-ship."

In reading the voluminous evidence in this record we fail to find a single instance in which the will of the president was disregarded by the board of directors. Indeed, the record of the board shows but one act was done relating to the business of the

company or the duty of its officers from January, 1892, to August, 1894. The business of the corporation was conducted precisely as though it had been the private business of Pulitzer. The ingenious wording of the by-laws placed it out of the power of the directors to be "meddlesome" or to interfere with Pulitzer's "boss-ship."

And he used his power, though always protesting his annoyance and desire to be relieved of it. He appointed or dictated the appointment of all the principal agents and employes, and fixed their salaries; he directed the policy and management of the paper; he drew out the earnings at will before dividends were declared, speaks of the paper as "my paper," and treats everyone connected with it as his employes. Thus, by the unanimous voice of the stockholders, he was given absolute and unlimited control over the affairs of the corporation and the authority was acquiesced in by the directors.

With this governing power over the business of the corporation, which, the evidence shows, was known to plaintiff, the contract was made. It is not at all remarkable that plaintiff should have negotiated directly with him, instead of the directors, who never interfered or meddled.

After the negotiations had been concluded, and the contract signed, Pulitzer gave plaintiff the following note addressed to Williams, who was then editor of the Post-Dispatch and a director in the corporation:

<sup>31</sup> "Dear Mr. Williams: I hereby appoint Col. Charles H. Jones editor and manager of the Post-Dispatch. Please instruct everybody accordingly.

"Faithfully yours,

"JOSEPH PULITZER, President.

"Jekyl Island, Feb. 6th, 1895."

The order was delivered to Mr. Williams on the 14th of February and everybody was instructed accordingly. The Post-Dispatch was then in charge of Messrs. Williams and White. Both were directors of the corporation, the former being its vice-president. They made no protest to the action of Mr. Pulitzer, but acquiesced therein by installing plaintiff as editor and manager.

In the issue of the Post-Dispatch of the 14th of February, Pulitzer, over his name, published the announcement of the change in which he says: "Continued ill-health and loss of sight have rendered it impossible for me to give personal attention to the conduct of the Post-Dispatch. I have not been able even

to visit the city for many years past. Authority implies duty. I relinquish duties to which I am physically no longer equal at a distance, and responsibilities which should only accompany the actual supervision of affairs. With this day Col. Charles H. Jones, having acquired a proprietary interest in the Post-Dispatch, becomes 'its editor and manager with responsibility and control over its columns.' "

In the same issue plaintiff announces his intentions "under my management of the Post-Dispatch."

These announcements were read by the stockholders, and they were informed that plaintiff had secured a proprietary interest in, and would thereafter be, the manager, "with responsibility and control over its columns." Still we find no protest or objection from stockholder or director. It must be inferred that neither Williams nor White approved of the change of <sup>32</sup> management, for one of them thereby lost his position, and the permanency of the position of the other was left in doubt. They remained silent because they recognized the power and delegated authority of Pulitzer.

There can be no doubt, we believe, that Pulitzer had authority from the stockholders and directors to make the contract, and thereby to bind the corporation, provided the agreement was itself valid.

5. Is the contract valid and binding on the corporation? Counsel argue that it is not, because against public policy.

We have attempted to show in a previous paragraph that the directors, either by their official action or through the president, had the power to appoint plaintiff editor and manager of the Post-Dispatch, and to give him control of the same, and that the contract in that particular is not in contravention of the statute which requires that the property and business of a corporation shall be managed and controlled by directors. The corporation does not, by the contract, divest itself of its organic character or of the powers and obligations incident to its existence as claimed. It is left entirely free to exercise all its organic functions, but it is bound, as an individual is bound, to perform its agreements. Power to control its business does not imply the right to repudiate contracts lawfully entered into.

But it is said that the contract is against public policy, and void for the reason that it couples with a sale of stock in the corporation an agreement to give to the purchaser a position for five years at a large salary, and in addition the position of director and president of the corporation.



Counsel cite many cases in support of their position. It is undoubtedly true that an agreement by one stockholder for the sale, directly or indirectly, of an <sup>33</sup> office in a corporation or of a permanent position therein "would be against public policy and void," though the contracting stockholder had shares sufficient in amount to give him control in the election of officers. By such agreement he might be required to act contrary to the duty he owed the company and other stockholders: *West v. Camden*, 135 U. S. 507.

Each shareholder in the corporation has a right to rely upon the judgment of all the others, in the election of directors and officers, and any agreement which puts it out of his power to exercise such judgment is against public policy.

An examination of the cases, however, will show that such contracts have generally been declared void for the reason that the duty the stockholder owes to the company and his associates would be thereby violated: *Cone v. Russell*, 48 N. J. Eq. 212; *West v. Camden*, 135 U. S. 507; *Fuller v. Dame*, 18 Pick. 472; *Guernsey v. Cook*, 120 Mass. 501.

But a corporation, that is to say, the stockholders and officers, has the right to employ the best expert talent they can secure for the management of its affairs. Success depends upon good management. Personal interest in the manager creates an incentive to succeed.

The successful management of a large daily paper in a city requires the highest degree of talent as well as large experience. One possessing these qualifications is difficult to secure, and commands a large salary. During the year 1894 the *Post-Dispatch* had not been as profitable as in previous years. A change of management was thought desirable, at least by Pulitzer. Plaintiff was possessed of experience, talent, and characteristics which were supposed to specially qualify him for increasing the earning power of the paper. <sup>34</sup> The contract was made with a view of securing his services.

It seems to us that all objections to the contract, so far as it relates to the employment of plaintiff as editor and manager and gives him editorial control, on the ground that it is against public policy, is removed if the directors and stockholders gave it their unanimous assent. The stockholders or directors of a corporation have the right, in the first instance, to dispose of its stock to such persons as, in their opinion, will be of advantage to it in a business point of view, or to such as will insure its man-

agement according to the views of the promoters. It is perfectly manifest that this company was organized with a view of having it managed by Pulitzer. "Continued ill-health and loss of sight," says Mr. Pulitzer in his public announcement, "have rendered it impossible for me to give personal attention to the conduct of the Post-Dispatch. I have not been able even to visit the city for many years past. Authority implies duty. I relinquish duties to which I am no longer equal at a distance, and responsibilities which should only accompany the actual supervision of affairs."

There is no more reason why the manager selected should not be allowed to purchase an interest in the company, at this crisis in its affairs, than that Pulitzer was allowed, in the original organization, to subscribe for a majority of the stock and thereby secure the power of control. It could make no difference whether the stock was purchased from the company or from the stockholders, provided, of course, that no wrong was done to the company or the other stockholders, or that they gave their unanimous approval.

As has been seen, the directors and stockholders, on being informed of the contract, made no objection thereto, but, on the contrary, immediately installed <sup>35</sup> plaintiff as editor; and at a meeting of the stockholders held on the sixteenth day of March, 1895, by unanimous vote elected him a director in the corporation. But, to emphasize the ratification, the new board of directors, on the same day, elected him president. So the contract, in all particulars material to this controversy, was approved and ratified by all the stockholders.

Defendants allege that they were not fully advised of all the terms of the agreement, but their action as stockholders and directors show that they were advised that plaintiff had secured from Pulitzer sixteen hundred and sixty-seven shares of stock, that he was made editor and manager, with control of the publication of the paper, and that he was to be made a director and president; or, if they were not advised, they blindly voted as directed by Pulitzer. If the latter was the case, then surely they ought not to complain. The contract then stands as though it had been made by the unanimous vote of all the stockholders.

The only issue involved in this suit relates to the right of plaintiff under his contract to manage the paper and control its policy. Whether the stockholders or Pulitzer, who still owns two-thirds of the stock, could be required to elect plaintiff a di-

rector, is not involved and the legality of the contract in that respect requires no consideration.

It seems that Pulitzer, and with him the other stockholders, soon repented of the contract, and, under a resolution voted by them, over the protest of plaintiff, undertook to modify it in respect to the control plaintiff should have over the policy of the paper. This they had no right to do. A corporation has no more right to repudiate its valid contracts than an individual has.

6. But it is insisted that a court of equity will <sup>36</sup> not interfere to prevent a breach of the agreement in question, though it is the contract of the corporation and one it had the power to make.

It is urged, in the first place, that an injunction should not be granted, because plaintiff has an adequate remedy at law in an action for damages in case he is denied the right to edit and manage the paper according to his own judgment; second, that there is a want of mutuality of remedy, without which a court of equity will not decree specific performance; and third, that the contract, in substance and effect, is a mere employment of plaintiff as editor and manager of the paper, and equity will never compel an employer, against his will, to retain an employé in his service.

There can be no doubt of the correctness of these general propositions, but do they apply to this contract? In other words, would an action for damages afford plaintiff an adequate remedy? Is there such a want of mutuality in the contract as would prevent a court of equity from enforcing it against the corporation and its directors? Is plaintiff, under the contract, a mere employé of the corporation, whose rights cannot be protected by a court of equity?

(a) Under the contract, plaintiff purchased sixteen hundred and sixty-seven shares of stock in the corporation for which he paid eighty thousand dollars, and in consideration thereof he was to have the "control and management" of the Post-Dispatch for five years at an annual salary of ten thousand dollars. In addition to his salary he was entitled to receive the dividends on his stock, which were shown to have been large in previous years, though not satisfactory to Pulitzer. The value of the tangible property of a newspaper is insignificant when compared with its business value and earning power. The value of the stock of such a corporation depends very largely upon the ability with which



the business is managed. Plaintiff <sup>37</sup> had confidence in his own ability to manage this paper, for he stipulates that his appointment and salary shall cease, unless the net profits, under his management, would stand the tests imposed by Pulitzer. Plaintiff also had a reputation to sustain, and an opportunity to enlarge it. The management of a metropolitan newspaper also gives to the manager a power and influence among men which is estimated by some as beyond a money value. In this respect it is *pretium affectionis*.

Our statute provides that the remedy by injunction "shall exist in all cases where an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages": Rev. Stats. 1889, sec. 5510.

In giving construction to the section, this court has held that "the action of injunction may be resorted to, notwithstanding there may be an adequate remedy at law for the injury, in all cases where an adequate remedy cannot be afforded by an action for damages as such": *Towne v. Bowers*, 81 Mo. 496; *State Sav. Bank v. Kercheval*, 65 Mo. 688; 27 Am. Rep. 310.

It is perfectly manifest that the control and management of the paper was the chief inducement that actuated plaintiff in entering into the agreement. With the acceptance of the position of editor and manager he gave up his situation on *The World* and removed from New York to St. Louis. He invested his entire capital in the enterprise. His stock was held by the corporation in such a manner that he could not use it for any purpose. The control of the paper was, moreover, a property right, in the nature of a lease, which he had the right to enjoy for five years. Its value to him depended upon the success with which it was managed. <sup>38</sup> Mr. Pulitzer, who was at the time president of the corporation and manager of the paper, in a letter to Mr. Williams, who was then the editor, in explaining the situation and the reason for the change in the editorial management, says: "I am convinced that your paper needs a stronger hand and permanent head"; and in his announcement of plaintiff's appointment, made in the columns of the *Post-Dispatch*, he says: "With this day Col. Charles H. Jones, having acquired a proprietary interest in the *Post-Dispatch*, becomes its editor and manager with responsibility and control over its columns."

It appears perfectly manifest that, taking from plaintiff the right to manage and control the paper, according to his own judg-

ment, could not be compensated in damages. Every other right acquired rests upon the right to control. It would be impossible to anticipate the effect a successful management might have upon the pecuniary value of the paper and of the corporate stock, to say nothing of the prestige it would give the manager.

Our conclusion is, that the contract, and the rights acquired thereunder, are such that a breach of it by defendants cannot be compensated by an action at law for damages.

(b) Is there such a want of mutuality of remedy as will prevent a court of equity from granting injunctive relief? Under the contract plaintiff was appointed editor and manager of the Post-Dispatch. These duties require personal services which it may be agreed a court of equity could not enforce. It could not by decree compel an editor to write editorials or to give direction to the business. But this want of power in the courts is supplied in the contract itself. While Mr. Pulitzer expresses the utmost confidence in plaintiff and his willingness <sup>39</sup> and ability to discharge his duties with fidelity, his own business instincts are too acute to allow the contract to rest in confidence alone. The corporation was organized "for pecuniary profit and gain": Rev. Stats. 1889, sec. 2771, subd. 11. Mr. Pulitzer does not lose sight of the primary objects to be accomplished. He expressly fixes a pecuniary test of ability and fidelity. The contract provides:

"And it is further agreed by and between the parties hereto, as a test of the ability of the party of the second part to properly manage and edit said St. Louis Post-Dispatch, that such appointment and salary shall cease and determine in the event that the gross revenues of the Post-Dispatch from advertising and circulation combined shall, during the year 1895, be less than the gross revenues from the same source combined were for the year 1894. And it is further agreed by and between the parties hereto that said appointment and salary shall cease and determine in the event that the net profits of the Post-Dispatch for the year 1896 shall be less than the net profits for the year 1893. And it is further agreed by and between the parties hereto, their executors, administrators, or assigns, that in case of the death of the party of the second part, his resignation, failure of health, or retirement, or inability to perform the duties and labors of editor and manager of the Post-Dispatch at any time within three years from the date of the execution of this contract, the party of the first part shall have the option to repurchase for the sum of eighty

thousand dollars the herein mentioned one thousand six hundred and sixty-seven shares of the stock of the Pulitzer Publishing Company, which, in such event, the party of the second part agrees to sell and transfer to the party of the first part for said sum of eighty thousand dollars."

It is further provided that the appointment and <sup>40</sup> salary should cease if plaintiff should "at any time during said term accept or occupy any public or political office, elective or otherwise, or engage in any other business of any kind or description."

The test of duty and liability is thus expressly agreed upon which is absolutely determinable and does not depend upon the views or opinions of either party. The failure to come up to the test is followed by a forfeiture of the position and salary. The test is success; the remedy, in case of failure for any of the causes, is removal from position and forfeiture of contract.

Should plaintiff fail to perform his contract according to the tests provided and should then persist in controlling the paper in disregard of the provision that the appointment should cease, there can be no doubt that a court of equity would enjoin his interference just as it can enjoin an interference with his rights if threatened. Keeping in view all the time that the right to manage and control the newspaper is the matter in issue, it is apparent that the remedy is mutual. The question is, Are the defendants entitled to the control? A court of equity can answer the question and enforce its conclusions on the petition of either party. Defendants could, undoubtedly, charge by cross-bill that plaintiff had failed to perform the conditions of the contract and had forfeited his right to control, and, if proved, the court could require plaintiff to allow them to resume control and enjoin an interference with it.

(c) The law is well settled that personal contracts for service will not, because they cannot, be enforced by courts of equity.

But we do not view the duties to be performed by plaintiff under the contract as mere personal service or simple employment. In his control and management of the paper he knows no master or employer. He is answerable to no one for the manner of performing his <sup>41</sup> duty. He is accountable only for the stipulated results. His position gives him a property right in the possession, control, and management of the paper he agrees to edit and manage.

A reading of the contract will show that the central idea of the executory part of it is the control and management of the



paper. That means the possession and use of the property, and not mere employment to write editorials.

The judgment of the circuit court is affirmed.

Barclay, C. J., and Gantt and Brace, JJ., concur.

Burgess, J., does not sit.

FROM THE FOREGOING OPINION Judges Sherwood and Robinson dissented and expressed their dissent in an exceedingly lengthy opinion written by the former. He was of the opinion that the transaction involved and the negotiations and circumstances attending and leading to it did not show an intention to place the newspaper in question so absolutely within the control of the complainant as was indicated by the opinion of the majority of the court; that the contract entered into was not corporate, but personal, and that it was difficult to see how anyone could act officially on paper and not so state therein: *Spear v. Ditty*, 9 Vt. 282; *Callahan v. Davis*, 125 Mo. 27; *Howard v. Heck*, 88 Mo. 456; that the contract in question has all the features that pertain to, and the characteristics of a contract executed between individuals; that even if Pulitzer had otherwise intended, the contract as drafted and signed "despite that intention would still have been only personal," regardless of who owned a majority of the shares of stock in the corporation, and for these reasons, that the stockholders could not enter into a contract with third persons, because such contracts must be entered into by directors, and not by the stockholders, and that however great may be the ownership of stock by any one person, he does not in consequence thereof acquire any authority to act for the corporation: *American etc. Co. v. Norris*, 43 Fed. Rep. 711; *Pullman's etc. Co. v. Railroad*, 115 U. S. 587; *Moore etc. Co. v. Towers etc. Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; *Davis Wheel Co. v. Davis Wagon Co.*, 29 Fed. Rep. 760; *Humphreys v. McKissock*, 140 U. S. 304; *Guernsey v. Cook*, 117 Mass. 548; *England v. Dearborn*, 141 Mass. 590; *Hopkins v. Lead Co.*, 72 Ill. 373; *Hill v. Rich etc. Co.*, 119 Mo. 9; that the contract was not ratified by the corporation, and could not have been ratified by it, because it did not have full knowledge thereof: *First Nat. Bank v. Gay*, 63 Mo. 33; 21 Am. Rep. 430; that a ratification on the part of the stockholders required their unanimous consent, which could not have existed in this case, because certain of them had no knowledge of the contents of the contract; that the contract, even if ratified, was not of such a character that it could be specifically enforced, because it was a personal one on the part of the complainant, and was not certain, definite, just, nor fair in all its parts, nor was it mutual; that even if the contract were mutual, specific performance should be refused, because, as the contract was construed in the majority opinion, it gave the plaintiff absolute control and management of the corporation with the power to subject it to liability by so using it as to subject the corporation to suits for libel, and otherwise to unconscionably impose obligations upon and to deal harshly with it; that the contract, if it admits of the construction contended for, was ultra vires and against public policy, and that it gave to Jones the

control and management of the corporation, whereas the law requires such control and management to be vested in the board of directors; that the contract was also void, because it was an agreement to give Jones a position for five years at a large salary, and also to make him director, president, and manager: *West v. Camden*, 135 U. S. 507; *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265; 42 Am. Rep. 162; *Wilbur v. Stoepel*, 82 Mich. 344; 21 Am. St. Rep. 568; *Fennessy v. Ross*, 39 N. Y. S. 323.

**CORPORATIONS—POWERS OF ONE OWNING MOST OR ALL OF THE STOCK.**—A corporation is a legal entity, separate and distinct from the individuals who from time to time may be its stockholders: *Moore etc. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23. In an appropriate case, and in furtherance of the ends of justice, a debtor corporation and the individual owning all its stocks and assets will be treated as identical: *Pott v. Smucker*, 84 Md. 535; 57 Am. St. Rep. 415. Such a stockholder may make a valid mortgage of the corporation property: *Swift v. Smith*, 65 Md. 428; 57 Am. Rep. 336. See *Louisville Banking Co. v. Eisenman*, 94 Ky. 83; 42 Am. St. Rep. 335, and note.

**CORPORATIONS—DELEGATION OF POWER TO PRESIDENT—POWER IMPLIED WHEN.**—The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation. His power depends upon the nature of the corporate business and the authority given him by the board of directors. They may invest him with authority to act as the chief executive officer of the corporation. This may be done by resolution or by acquiescence in a course of transacting the corporate business: *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; 50 Am. St. Rep. 330, and note; *Ford v. Hill*, 92 Wis. 188; 53 Am. St. Rep. 902, and note. His authority may be inferred from evidence of usage: *Swasey v. Emerson*, 168 Mass. 118; 60 Am. St. Rep. 368. He is presumably authorized to carry out the corporation's lawful contracts: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312, and note. See *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859, and note. The fact that a person having the active conduct of the business corporation is also its president does not operate as a limitation upon the powers usually exercised by its general agents or managers: *Ceeder v. Loud etc. Co.*, 86 Mich. 541; 24 Am. St. Rep. 134, and note.

**CORPORATIONS—OBLIGATIONS OF, THOUGH NOT IN CORPORATE NAME OR NO AGENCY IS SHOWN.**—A note not in the corporate name, and not disclosing any agency from the corporation to make it, is prima facie not the note of the corporation, but the presumption may be rebutted by evidence aliunde: *Melledge v. Boston Iron Co.*, 5 Cush. 158; 51 Am. Dec. 59, and note. The sole owner of the stock of a corporation continuing to do business as such is not personally liable on indorsements of drafts made by him in the name of the corporation, when no fraud is practiced and all the parties to the transaction act in the belief that the corporation alone is liable: *Louisville Banking Co. v. Eisenman*, 94 Ky. 83; 42 Am. St. Rep. 335. See *Duggan v. Pacific Boom Co.*, 6 Wash. 593; 36 Am. St. Rep. 182, and note.

**SPECIFIC PERFORMANCE—MUTUALITY.**—To sustain a demand for the specific performance of a contract it is generally essential that there be a mutuality of remedy; or in other words that each of the parties have the right to compel the other to perform it: *Note to Grimmer v. Carlton*, 27 Am. St. Rep. 173. See *Hissam v. Parrish*, 41 W. Va. 686; 56 Am. St. Rep. 892, and note.

**BALDWIN v. DAVIDSON.**

[139 MISSOURI, 118.]

**RES JUDICATA—PROBATE COURT, ORDERS OF.**—The approval by the probate court of the final account of an administrator is a judgment entitled to the same favorable presumptions which are accorded to the judgments of all courts of record, which can only be set aside for fraud in their procurement.

**JUDGMENTS—FRAUD IN, WHEN APPEARS FROM THE CONDUCT OF THE JUDGE.**—If a probate judge on being informed by persons interested in an administrator's account that they desire to contest it, replies that when it is filed, he will approve it if fair on its face, and that they could then appeal, this shows a determination on his part to approve it, whether right or wrong in fact, and when followed by his approval of the account after filing, without giving any opportunity to contest it, establishes a fraudulent and collusive arrangement between him and the administrator, entitling the persons interested in contesting the account to relief in equity.

**JUDGMENT—RELIEF IN EQUITY, WHEN NOT BARRED BY THE RIGHT OF APPEAL.**—The fact that persons interested in contesting an administrator's account had an adequate remedy by appeal from an order approving such account does not preclude them from maintaining a suit in equity for relief against such order on the ground that it was procured by fraud or collusion between the probate judge and the administrator.

E. R. Lentz, for the appellants.

Dinning & Byrns, for the respondents.

**122** **BURGESS, J.** This is a suit in equity by the only children and heirs at law of J. W. Baldwin, deceased, to surcharge and falsify the accounts of I. M. Davidson as the administrator of the estate of said Joseph W. Baldwin, deceased. The suit was begun in the circuit **123** court of Butler county, but the venue was subsequently changed to the circuit court of Washington county, where a trial was had on the eighth day of March, 1894. The defendant, I. M. Davidson, died since the suit has been pending in this court, and it was revived against the present defendants as his executors.

At the request of plaintiffs the court made a finding of facts as follows:

"1. The court finds that at the May term, 1890, of the probate court of Butler county, Missouri, in which court administration proceedings were pending, the defendant Davidson, on Thursday, the fourth day of the term of said probate court, filed his final settlement, after having given due notice according to law of his intention to make said settlement. The probate court approved said settlement by its proper order entered of record. The court finds from the evidence that the attorney of the plain-



tiffs in this action, representing the heirs, had informed the probate judge that he desired to contest the settlement of Davidson prior to the filing thereof, and was informed by the said probate judge that when the settlement was filed, if it was fair on its face, he would approve it, and the heirs could then appeal from his judgment. The court further finds that the probate judge acted from no improper motives in so advising counsel; that defendant Davidson was not advised that any contest was to be made upon said settlement; that there was no collusion between the probate judge and said Davidson as to the time when said settlement should be filed, or as to its examination and approval. The court finds that said settlement was duly approved.

"2. The court further finds that, within the time allowed by law, the plaintiffs here, who were the parties desiring to object to said final settlement, filed their <sup>124</sup> affidavit for appeal from the judgment of the said probate court and also gave their appeal bond as required by law, and that thereupon the said final settlement and proceedings in connection therewith were by the probate court transferred and sent to the circuit court of Butler county, Missouri; that said transcript was filed in the said court on the seventh day of July, 1890, that said cause on appeal remained of record in the circuit court from the date of the filing of said transcript until August, 1891, when the said appeal was voluntarily dismissed by the plaintiffs; that at one term of the said court this cause was continued by agreement of the parties; that depositions were taken in said cause and preparations were made for trial thereof; motions filed from time to time to suppress depositions; which motions were acted on by the circuit court in said cause; that no attack was made upon the jurisdiction of the Butler county circuit court, in said cause, and no question raised as to such jurisdiction; and the court finds from the evidence that said court had jurisdiction of said cause."

The court then found as conclusions of law "that under the finding of facts numbered 1, when the final settlement was approved by the probate court, it had the full force and effect of a judgment, and could only be set aside for fraud in the procurement of said judgment; and, being a judgment of the probate court, it is entitled to the same favorable presumptions and inferences as are accorded the orders and judgments of the circuit court; and the court finds that there was no fraud on the part of Davidson or the probate judge in the matter of the procurement of the said judgment of the final settlement."

And under finding of facts number 2: "That the plaintiffs had in said probate court a full and adequate remedy for a proceeding at law to correct all <sup>125</sup> errors, if any, and improper charges by said Davidson as administrator in his final settlement, and having such complete remedy at law, and having voluntarily dismissed their proceeding, they ought not now be permitted by a proceeding in equity to again litigate the same matters."

Plaintiffs' bill was then dismissed and judgment rendered against them for costs. They then filed their motion for a new trial and the same being overruled they appealed.

No objection is taken in the motion for a new trial to the finding of facts, or to the failure of the court to find on any allegation in the petition with respect to any specific matter, so there is nothing presented by the record for review, save and except the law as ruled by the court upon the facts as found.

While the court correctly declared the law to be that the approval by the probate court of the final settlement of Davidson was in law a final judgment and entitled to the same favorable presumptions which are accorded to the judgments of all courts of record which can only be set aside for fraud in their procurement, it does not seem to us that the facts, as found, justified the conclusion that there was no fraud upon the part of Davidson or the probate judge with respect to the approval of the final settlement.

When the attorney for plaintiffs informed the probate judge that he desired to contest the settlement of Davidson prior to the filing thereof, and was informed by said judge that when the settlement was filed, if it was fair on its face he would approve it and the heirs could then appeal from his judgment, it showed a determination upon his part to approve it whether right or wrong in fact, and although it may have been burdened with fraudulent debits and credits. He not only advised plaintiffs' attorney of his purpose <sup>126</sup> to approve the settlement, but seems to have carried out his predetermination to the letter, and to have given them no opportunity to be heard with respect to the settlement as a whole, or any part or parcel thereof. This was not only a fraud upon plaintiffs but an absolute denial of justice, and showed conclusively that the approval of the settlement was procured by reason of a fraudulent and collusive arrangement between Davidson and the judge of the probate court. A judgment thus obtained will be set aside at the instance of the heirs of the administrator's intestate: *Mayberry v. McClurg*, 51 Mo. 256; *Miles*

v. Jones, 28 Mo. 87; Harris v. Terrell, 38 Mo. 421; Smith v. Sims, 77 Mo. 269.

Nor are we prepared to concur in the views of the trial court as to the law under the finding of facts numbered 2. The voluntary dismissal of the appeal from the probate to the circuit court is no bar to this proceeding. Its legal effect is nothing more nor less than a voluntary nonsuit, which is not a bar to another suit on the same cause of action. To be a bar to another action there must be judgment on the merits. It then becomes *res adjudicata*: Ellington v. Crockett, 13 Mo. 72. In Wells v. Moore, 49 Mo. 229, it is said that "where the former adjudication was not on the merits, it forms no bar to another action." The merits of the case were in no way passed upon by the probate court, hence no bar to this action.

Nor is the fact that plaintiffs may have had adequate remedy at law, by the prosecution of their appeal from the probate to the circuit court, any barrier to the prosecution of this suit. In Stewart v. Caldwell, 54 Mo. 536, Sherwood, J., in delivering the opinion of the court, said: "But fraud belongs to the original jurisdiction, always exercised by a court of equity, and constitutes its most ancient foundation; and such <sup>127</sup> jurisdiction is not ousted because a remedy exists at law, for the jurisdictional powers formerly possessed by that court still continue unaffected by the enlargement which is taking place in the functions of the courts of law; and will not be extinguished by anything short of direct and positive prohibitory enactment": 1 Story's Equity Jurisdiction, secs. 64, 80, and cases cited; Potter v. Herring, 57 Mo. 184.

The judgment is reversed, and the cause remanded with directions to the trial court to proceed with the trial of the cause upon its merits.

Gantt, P. J., and Sherwood, J., concur.

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**JUDGMENT—COURTS OF PROBATE.**—The orders and judgments of probate courts, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction: Sherwood v. Baker, 105 Mo. 472; 24 Am. St. Rep. 399, and note. See, also, Price v. Springfield etc. Assn., 101 Mo. 107; 20 Am. St. Rep. 595, and note.

**JUDGMENTS OF COURTS OF PROBATE—POWER OF EQUITY OVER.**—The conclusiveness of decrees of distribution and the power of chancery to correct or set aside settlements of accounts in probate courts are discussed in the monographic note to Green v. Creighton, 48 Am. Dec. 744-751. See note to Deck v. Gerke, 73 Am. Dec. 558-560, and monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 220, 221.



**JUDGMENTS—RELIEF FROM, IN EQUITY—EFFECT OF RIGHT OF APPEAL.**—Generally, when a party seeking relief from a judgment has an adequate remedy at law by some motion in the original case, equity will not interfere in his favor: Freeman on Judgments, 4th ed., sec. 497. See monographic note to *Oliver v. Pray*, 19 Am. Dec. 603-612. If a judgment rendered in the circuit court is erroneous, equity cannot remedy the error, for the legal remedy is by appeal to the appellate court: Note to *Railway Co. v. Ryan*, 13 Am. St. Rep. 870. See note to *Vann v. Hargett*, 32 Am. Dec. 694, 695.

## BUTLER v. HARRISON LAND AND MINING COMPANY.

[189 MISSOURI, 467.]

**A CORPORATION, THOUGH INSOLVENT, MAY PREFER** some creditors to others, even though such creditors are among its directors.

**CORPORATIONS—TRUST FUND, ASSETS OF, WHEN CONSTITUTE.**—The only sense in which it can be said that the assets of an insolvent corporation are trust funds when in the hands of the managing board of directors, is that the assets must be used in the discharge of corporate obligations before any portion can be absorbed by the directors in payment of stock or certificate obligations to the stockholders, whether they be director or non-director stockholders.

**CORPORATIONS—PREFERENCES IN FAVOR OF DIRECTORS—ATTACK UPON BY OTHER CREDITORS.**—If an insolvent corporation disposes of all its assets by transferring them to directors in satisfaction of debts due to them, another creditor who afterward procures a judgment against the corporation, and levies upon and sells the property so transferred to such directors cannot maintain a suit in equity to set aside such transfer.

L. B. Woodside, for plaintiff appellant.

A. U. Farrow and T. A. Post, for defendant appellant.

**471** **ROBINSON, J.** By this action plaintiff seeks to have set aside and canceled certain deeds to about twelve thousand acres of land in Dent county, made by the Nova Scotia Iron Company, a corporation, to certain of its directors, and by them afterward conveyed to the defendant, the Harrison Land and Mining Company. Plaintiff, as an after execution creditor of the Nova Scotia Iron Company, sold the land as the property of the Nova Scotia Iron Company, and became the purchaser thereof.

The petition in substance charges that the deed to the Dent county land from the Nova Scotia Iron **472** Company was made to Messrs. Lackland, Harrison, and Howard, directors, and stockholders of said corporation, for the purpose of hindering, delaying, and defrauding the plaintiff in the collection of his debt against said company; that the corporation and all the officers

thereof knew of plaintiff's claim; that the corporation made and the directors accepted the deeds to said land for the purpose of delaying and defeating plaintiff in the collection thereof; that said Lackland, Harrison, and Howard, the grantees in the first-named deed, were also the sole directors and stockholders of the Harrison Land and Mining Company, the defendant herein; that they caused to be conveyed to said corporation the lands so formerly conveyed to themselves in furtherance of their design to defeat the plaintiff in the collection of his claim, and that said defendant took said lands with full notice of the fraudulent transfer from the Nova Scotia Iron Company to said Lackland, Harrison and Howard, and with full notice of plaintiff's claim. That plaintiff, as a creditor of the Nova Scotia Iron Company, after the conveyance above set out, obtained a judgment against said company, had execution issued, and caused a levy to be made upon said lands as the property of the Nova Scotia Iron Company, and had the same sold, and at said sale became the purchaser thereof. Then follows the prayer that the court set aside and cancel the deeds made by the Nova Scotia Iron Company to said Lackland, Harrison, and Howard, and to also set aside and cause the deeds made by Lackland, Harrison, and Howard to the Harrison Land and Mining Company and for such other judgment and decree as may to the court seem just and proper in the premises. Then followed a second count in ejectment for the possession of the lands.

<sup>473</sup> The defendants filed a general denial to the allegations of plaintiff's petition, with the further allegation on their part that "any and all conveyances made by the Nova Scotia Iron Company to Buford J. Lackland, John W. Harrison, and Thomas Howard, or either of them, and any conveyances made by said Lackland, Harrison, and Howard or either of them, to the Harrison Land and Mining Company, were not fraudulent in fact or law, but were made in settlement of the bona fide indebtedness; that the land thereby conveyed was worth far less than the amount of indebtedness in settlement of which said lands were conveyed."

Upon the testimony under the issues as thus made up the court found: "That Lackland, Harrison, and Howard, being directors of the Nova Scotia Iron Company, took all of the assets of said corporation in payment of their own claims, with full knowledge of plaintiff's claim, and that the same in equity should be charged with the payment of plaintiffs' judgment, and that

the said Harrison Land and Mining Company, through its said stockholders and directors, B. J. Lackland, Thomas Howard, and John W. Harrison, took the deed to said real estate with full knowledge of plaintiff's claim, and that the said real estate, in the hands of the said Harrison Land and Mining Company, should in equity be charged with the payment of plaintiff's judgment; that the said transfer from Nova Scotia Iron Company to said Harrison, Lackland, and Howard, was not fraudulent, but yet was against the rights of said plaintiff to the extent that he is entitled to have said land in the hands of defendant charged with the payment of said judgment."

It was therefore decreed that plaintiff's sheriff's deed be set aside and canceled, that plaintiff recover of defendants the sum of two thousand one hundred and sixty-four dollars and forty-five cents, and judgment therefor was declared a lien and charge upon the lands <sup>474</sup> described; and that the real estate described be sold to satisfy this judgment.

Without going into the testimony in detail, it will be sufficient to say that the Nova Scotia Iron Company was organized as a corporation under the laws of this state for the purpose of smelting and manufacturing pig-iron; that Lackland, Harrison, and Howard were the directors and sole stockholders of the company; that the company began operations in Dent county by erecting smelters and furnaces, building a branch railroad, and buying up a large tract of mineral land, and doing all other acts and things necessary to carry on and keep in operation a large plant for the manufacture of pig-iron.

That the furnace went into blast in 1881, and continued in operation until 1885, when, by reason of the failure to produce further ore from its mines and for various causes, the company ceased operations, at the time owing to its directors Lackland, Harrison, and Howard one hundred thousand dollars or more. The indebtedness of the company, with the exception of that of plaintiffs and a few small current bills, was all owing to these directors for money advanced by them from time to time to keep the enterprise going. There was also testimony tending to show that the company did not know of plaintiff's claim until just a short time before suit was begun on it in 1889, four years after the company had ceased active business.

After the furnace had remained idle for about four years and the directors found that it was impracticable to carry on the enterprise longer in Dent county, it was determined to close up



business in that county and to abandon the Nova Scotia works and to start a new furnace at Paducah, Kentucky. A company was accordingly incorporated at that place by Lackland, Harrison, and Howard as sole stockholders <sup>475</sup> and directors, and the furnace building and machinery of the Nova Scotia company in Dent county was by resolution of the board of directors adopted in February, 1889, sold to the Paducah company, and the Nova Scotia company was credited with sixty thousand dollars on its indebtedness to Lackland, Harrison, and Howard, in the proportion of thirty thousand dollars, twenty-one thousand dollars, and nine thousand dollars. To further satisfy its indebtedness, the company, pursuant to said resolution, made two deeds conveying to the same creditors and in the same undivided interests at a valuation of two dollars per acre, its lands in Dent and Reynolds counties, and Lackland, Harrison, and Howard in turn conveyed the lands to the Harrison Land and Mining Company, a corporation organized by Lackland, Harrison, and Howard, for the purpose of holding the property as a matter of convenience, in consequence of the fact that Harrison had minor children and in order to facilitate sales in cases of his death.

The Riverside railway and engine and other property of the Nova Scotia Iron Company were also sold to Lackland, Harrison, and Howard in the same proportionate interests pursuant to the same resolution. The testimony further shows that all of the property sold and transferred by the Nova Scotia company to the Paducah company, the Harrison Land and Mining Company, and to Lackland, Harrison, and Howard, was disposed of at a fair and reasonable price, and that it did not equal in value the amount of the Nova Scotia company's indebtedness to Lackland, Harrison, and Howard; that the company had no other property or assets than was disposed of as above; that the officers of the company had been notified of plaintiff's claim before the board of directors passed the resolution authorizing the transfer and disposition of all its property, and that within a day or so following the passage of the resolution of the board of directors, this plaintiff <sup>476</sup> began suit against the company and obtained a judgment for two thousand two hundred and forty-five dollars and forty cents at the October term, 1890, of the Dent county circuit court, and afterward, on execution issued thereon, had the lands of the Harrison Land and Mining Company levied upon and sold as the lands of the Nova Scotia company, and he became the purchaser thereof.

Plaintiff's petition in its substantial averments is but a proceeding to invalidate defendant's deeds to the lands in controversy on the ground of fraud in fact, with a second count in ejectment for the possession of same, and is in no sense a creditor's bill asking that the so-called fraudulent conveyance of the land be set aside and same be resold under an order of the court, and the proceeds divided pro rata among all the creditors, after an accounting has taken place. It is not our purpose, however, in this opinion, to discuss the form of the proceeding, or to criticise the impropriety of the particular decree entered, but will confine our discussion to the vital question that presents itself for determination regardless of the form of the action, or the want of authority for the decree as rendered. That is, can an insolvent corporation prefer its director creditors, in the disposition of its property, to the exclusion of its general nondirector creditors, so long as the property of the corporation remains in its custody and possession, and the preference is made in good faith, to pay off and discharge honest obligations? Or as that proposition bears upon the facts of this case, ought the title of the defendants to the land in question prevail against that of the plaintiff?

As will be seen from a reading of the judgment and decree of the trial court, all the issues of fact were found against the allegations of plaintiff's petition and in favor of the contention of the defendants. Yet the court adjudged the conveyance made by the corporation <sup>477</sup> to the land in controversy in favor of the right of plaintiff, to the extent that he is entitled to have same in the hands of defendant charged with the lien of his judgment claim against the Nova Scotia Iron Company. Plaintiff's contention now is, as was manifestly the view of the trial judge, that even though there was no fraud shown in the transaction, which resulted in the conveyance of the land in suit by the corporation to its directors, Lackland, Harrison, and Howard, yet they could not, as directors of the corporation, absorb all the property in payment of their debts and leave plaintiff's debt wholly unprovided for; that the assets of the insolvent corporation were trust funds for the benefit of all its creditors, in so far as to prohibit the disposition of it toward the payment of the debts due its directors to the exclusion of others.

While there is to be found asserted in several opinions of this court the general expression "the assets of an insolvent corporation is a trust fund in the hands of its directors for the benefit of all its creditors," and while there is to be found asserted in the

earlier cases in some of our sister states the broad doctrine that, when a corporation becomes insolvent, its property and assets at once become converted into a trust fund, of which its directors are trustees for all the creditors of the corporation, and that the directors have no power to prefer their claims, or those of any particular creditor or creditors, as against all creditors in general, but must proceed as though they were receivers or assignees, to sell out, wind up, and distribute the proceeds therefrom among all creditors ratably, no such doctrines have ever obtained in this state in that fullness, or if ever recognized have had no sanction since the ruling in the case of *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 87, wherein Sherwood, J., speaking for the court, used this clear and positive <sup>478</sup> language: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of those purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditor to others, even though such creditors are among the directors of the corporation"; and again in the case of *Alberger v. National Bank*, 123 Mo. 313, the court says: "There is nothing in the law of this state which can properly be construed to constitute the directors trustees for all general creditors alike, or to limit their power of dealing in good faith with the property by way of preference to one creditor, so long as the company, undissolved, holds the title to the property."

And in the still more recent case of *Schufeldt v. Smith*, 131 Mo. 280, 52 Am. St. Rep. 628, where the directors of the insolvent corporation, by a resolution of the board, executed a deed of trust to one Smith as trustee, securing the corporation creditors in the order of preference declared in the deed, and early in the order was one of its members, it was sought to have set aside the deed of trust as absolutely void on the ground that the directors had no power to bind the corporation to the agreement made with themselves, this court after a denial of the correctness of the proposition asserted by plaintiff in that, as in this case, used this language: "But it cannot be said as a correct proposition of law that officers of a corporation cannot themselves and in their own names contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to



indorse for them, without subjecting themselves to such disadvantages, they would be deprived of this most valuable <sup>479</sup> source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. . . . If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another."

In all of the reported cases in this state where the proposition is announced in the course of the opinion that "the assets of the insolvent corporation are to be treated as a trust fund for the benefit of all the creditors," the insolvency of the corporation has been confessed, or a court of equity has been appealed to by the corporation or some of its creditors to take charge of, protect, dispose of, or distribute the assets according to equitable principles, or the right of disposition of the property by the corporation had been stayed, either by its voluntary action, or by legal process directed against the corporation or its officers; but never to a going concern, empowered by its very creation with the right to transact business and to acquiring and alienating property.

It is no answer to the assertion of disposition of corporate property by its directors at all times and to whomsoever they desire, so long as it remains under the directors' management and control, to say that the corporation was created for public objects, or in consideration of public benefits, and was clothed by its charter or governing statute with the performance of public duties, and therefore its property is impressed with the qualities of a public trust; that its directors and managers cannot deal with it other than as with a trust for the public or general good, as soon as a <sup>480</sup> condition of insolvency is approached. While corporations are creations of the law, and have certain duties and obligations to perform to the public under the law, their inspiration and aim is also the advancement of private individual interests, and when its public duties and obligations have been performed, it may do any and all acts in furtherance of the purpose of its incorporation within the scope of that purpose, which the individual corporator or corporators might do under like circumstances. The fact that a corporation is a public creation, a thing of the law, does not change, unless restricted by legislative enactment, or limited by its charter power, the character of

its holding and ownership of property, with the necessary right of free disposition thereof involved in the prosecution of the object of that creation. And as said above, there is nothing in the laws of this state limiting the power of corporations dealing in good faith with their property, so long as the corporation, undissolved, holds the title thereto and the possession thereof: *Alberger v. National Bank*, 123 Mo. 313.

If the assets of an insolvent corporation are to be held and treated by the courts as a trust fund for the benefit of all creditors alike at a time before a court has taken charge thereof, and the court is permitted to reach back of the time when its authority over the corporation and its property was first openly asserted, to ascertain when in fact a state of insolvency did exist, and from that time on impress a trust burden on all after disposed of property, all dealings with corporations would be involved in such uncertainty and possible embarrassment as to render them unfit to prosecute the business affairs of every-day life, in which they now play so conspicuous a part. No bankruptcy, insolvency, or assignment act, to the knowledge of the writer, has ever gone to that extreme limit in reaching <sup>481</sup> back to affect the disposition of property by its lawful custodian and owner, after the corporation and its assets had been placed in the hands of the law under the form prescribed by those acts; and, as we all know, the propriety and wisdom of bankruptcy or insolvency statutes in any form have ever been questioned by many of the best judicial and business minds of the country whenever and wherever enacted.

The only sense in which it can be said that the assets of an insolvent corporation are trust funds when in the hands of its managing board of directors is that the assets must be used to the discharge of the corporation obligations, before any portion of it can be absorbed by the directors in the payment of stock or certificate obligations of the stockholders, whether they be director or nondirector stockholders.

Then if the assets of an insolvent corporation in the hands of its board of directors is not a trust fund to be used for the benefit of all its creditors ratably, cannot they dispose of the property to themselves as creditors, to the exclusion of others if desired, bound only by the limit of good faith? That a corporation can contract with its directors for an indebtedness cannot be questioned. In fact, the corporation cannot act without the incurring of an obligation in favor of its managing board, and the in-

currence of a necessary obligation implies by a like necessity the duty to discharge it, and that duty with the power of disposition, which is an incident to ownership and control of property, means the right of election and preference in the matter of disposing of corporation assets when inadequate to satisfy in full all demands against it. The trust fund doctrine, as applied to the assets of an insolvent corporation managing its own affairs, can extend no further than to restrain the disposition thereof to <sup>482</sup> good faith creditors of the corporation, whether director or non-director creditors.

If it be conceded for the sake of plaintiff's contention, now made since the case has reached this court, that the assets of the Nova Scotia Iron Company, in consequence of its insolvency at the time of making the deed to the lands in controversy to defendant's grantor, became and was a trust fund, would it not be a joint trust for the benefit of all its creditors among whom, according to the facts of the case, and the finding of the trial court, were defendant's grantors?

Such being the case, Lackland, Harrison, and Howard, and the defendants as their grantee, certainly stand on a footing at least as good as that of the plaintiff, who was but a general creditor of the company; and plaintiff's remedy should have been by a creditor's bill in equity under which all the assets and property of the Nova Scotia Iron Company could have been ascertained, marshaled together, and resold, and the proceeds ordered distributed ratably among all the creditors, including the respondent as well as plaintiff. Instead of such a proceeding, he has sought through the one instituted here, which is in effect a law action, to appropriate the property of this defendant, conveyed to its grantors by the Nova Scotia Iron Company for full value, and in partial discharge of an honest obligation owing by the company to defendant grantors, for his own exclusive benefit. If the assets of the corporation are a trust fund, then the only forum for its disposition is in a court of equity, where all rights to the fund can be ascertained and determined, and where the clash and confusion incident to the assertion of individual liens and obligations regardless of the right of others may be avoided.

Under the facts of this case as disclosed by the evidence, the plaintiff finds himself now in the awkward <sup>483</sup> attitude of asking the court to assist him to the benefit of an enforced preference to the property of the Nova Scotia Iron Company and at the same time to deny the right of preference previously exercised by



the company voluntarily in favor of defendant's grantors (creditors of the company) of like standing with himself, a position certainly not tenable in a court of law or equity. Any right of preference that a court will enforce in favor of the vigilant in its forum will be recognized by the court when exercised voluntarily in favor of the vigilant in the forum of business.

The property of the Nova Scotia Iron Company at the time its directors made the deeds to the lands in controversy to themselves was not trust property in the sense that the directors, having its management and control in land, could not dispose of it to whomsoever they might choose in settlement or payment of honest obligations against the corporation for its reasonable value, without leaving it impressed with the burden of plaintiff's or any or all other demands against the company. If the land in suit was not trust property at the time it was deeded, and the corporation had the right of free disposition, which involves the idea of preference, that preference could be made in favor of its directors, when, as in this case, it was shown to have been done in settlement and discharge of honest claims. From the finding of facts by the trial court, and as the record shows them to exist, it is evident that the decree entered herein was predicated upon the theory that all the land in suit in the hands of the directors was trust property, burdened with all the debts of the corporation.

It follows from what has been said that the judgment of the trial court should be reversed and the cause remanded, with directions that the circuit court make an order dismissing plaintiff's bill, and it is so ordered.

Barclay, P. J., and Macfarlane, J., concur in the result.

Brace, J., concurs.

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**CORPORATIONS—ASSETS OF, AS TRUST FUND.**—The governing body or directors of a corporation hold its capital stock as a trust fund in order that it may be preserved and administered primarily for the benefit of creditors, and secondarily for the benefit of the stockholders: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 65. See *Ames v. Heslet*, 19 Mont. 188; post, p. 600.

**CORPORATIONS—INSOLVENT—PREFERENCE OF CREDITORS—DIRECTORS.**—The property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers of the corporation from dealing with it in such a manner as to secure preferences for themselves, and such a preference is fraudulent and void as to unsecured creditors: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78. See *Campbell etc. Co. v. Marder*, 50 Neb. 283; post, p. 573, and note.

## ST. LOUIS v. MEYROSE LAMP MANUFACTURING CO.

[189 MISSOURI, 560.]

**MUNICIPAL CORPORATIONS—ORDINANCES RESPECTING THE LICENSING OF ENGINEERS.**—An ordinance providing for a board of engineers and imposing on it the duty of examining persons who apply to be licensed as engineers, and to grant such licenses to the applicants found qualified, and which imposes a fine on any person employing an engineer not so licensed, is valid. It does not involve any delegation of legislative power, nor does it leave the granting or withholding of such license to the whim or caprice of the board of engineers.

E. J. O'Brien and D. B. Kribben, for the appellant.

W. C. Marshall and Leverett Bell, for the respondent.

**565 SHERWOOD, J.** The defendant was prosecuted in the police court. Information, the following:

"State of Missouri, \

ss.

"City of St. Louis. \

"City of St. Louis, Mo., August 23, A. D. 1894.

"F. Meyrose Lamp Manufacturing Co., a corporation **566** under the laws of the state of Missouri, Ferdinand Meyrose, president, to the City of St. Louis, Dr.

"To one hundred dollars for the violation of an ordinance of said city entitled 'An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city,' being Ordinance No. 15362, section 1623, approved November 20, 1889.

"In this, to wit: In the city of St. Louis and state of Missouri, on the twelfth day of July, 1894, and on divers other days and times prior thereto, the said F. Meyrose Lamp Mfg. Co., a corporation, being the owners and users of a steam generating apparatus, did then and there, at premises No. 731 South 4th street, employ and cause to be employed a certain person as engineer to operate and control said steam generator, said person not having first obtained a permit from the boiler inspector or a license from the board of engineers so to do, contrary to the ordinance in such case made and provided. On information of J. J. Burke."

Being convicted, it appealed to the court of criminal correction, in which court, when reached, it filed its motion to quash the information because:

"1. The ordinance upon which this proceeding depends contravenes the fourteenth amendment to the constitution of the

United States, in that it is not general and equal in its operation, and in that it grants substantially to two persons the arbitrary power to give or withhold their consent to carrying on a legitimate business in a legitimate manner; 2. The body called the 'Board of Engineers' without warrant of law gives power to grant and revoke licenses to persons to operate steam engines and boilers. This is a delegation of power which the <sup>567</sup> charter has committed to the mayor and municipal assembly only, and cannot be delegated to any other body; 3. The use of a man's property is as much property as the thing itself, and the ordinance, by depriving defendants thereof, is inimical to section 30 of article 2 of the constitution of Missouri, which forbids depriving one of his property without due process of law; 4. The ordinance is unequal, oppressive, unreasonable, partial, and discriminating, and is special legislation of the character forbidden by section 53, article 2, of the constitution of Missouri; 5. The ordinance is without power in the mayor and municipal assembly to enact, and is ultra vires, and for the foregoing reasons invalid."

The court denied the motion to quash, and defendant excepted. Thereupon plaintiff and defendant agreed to the following facts as constituting the evidence in the case: "The violation of the ordinance set out in the information is admitted. It is further admitted that defendant made application for a license for its engineer, and the same was refused."

Thereupon the court found the defendant guilty, and assessed its punishment at a fine of twenty-five dollars. From such judgment defendant appeals to this court.

The contention made by defendant against the validity of the ordinance in question seems to resolve themselves into two points: 1. It is void because (as counsel puts it) it violates the following provisions of the constitution of this state, viz: "That all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry": Const., art. 2, sec. 4. "That no person shall be deprived of life, liberty, or property without due process of law": Const., art. 2, sec. 20. <sup>568</sup> "Forbidding the legislature to grant 'to any corporation, association, or individual any special or exclusive right, privilege or immunity': Const., art. 4, sec. 53. 2. The ordinance is also void because it authorizes the board of engineers to examine applicants for licenses as engineers and to pass upon their capacity, skill, experience, and habits of sobriety, and hence is a delegation



of legislative power, because the charter confers such power upon the mayor and assembly.

The mayor and assembly of the city of St. Louis are authorized by paragraph 6 of section 26, article 3, to pass an ordinance, "to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health, or the manufacture or vending of articles obnoxious to the health of the inhabitants," etc.

Paragraph 7 of section 26 of article 3 of the charter authorizes the mayor and assembly, by ordinance, "to make provision . . . for the inspection of steam boilers and all steam heating apparatus, and to license engineers using steam boilers in said city," etc.

Paragraph 8 of section 26 of article 3 of the charter authorizes the mayor and assembly, by ordinance, "to regulate and provide for the election or appointment of city officers required by this charter, or authorized by ordinance, and provide for their suspension and removal," etc.

Paragraph 14 of section 26, article 3, of the charter, gives this additional authority: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city," etc. Such paragraph is usually termed a general welfare clause.

<sup>560</sup> Section 1948, et seq., of the Revised Ordinances of 1892, chapter 41, provides for the appointment of two persons, one of them a practical mechanical engineer, and one a manufacturer of engines, both of at least five years' experience in business, who, in connection with the other two, constitute a board of engineers. Provision is also made for the inspection of boilers, etc.

Section 1650 of the Revised Ordinances of 1892 provides for meetings of the board, a secretary, and records of the meetings to be kept, and for weekly meetings of the board to examine into the qualifications of applicants for engineers' licenses. A majority of the board constitutes a quorum. The secretary is required to keep a register of the names of all applicants, designating those found qualified and those not qualified. The ordinance then provides as follows: "Said board shall grant certificates of license for one year from date thereof, to all applicants who, upon examination, shall have the capacity, skill, experience, and habits of sobriety requisite to perform the duties of an engineer, and no person possessing such qualifications shall be refused a license."

Section 1652 allows owners of steam boilers of quite a small capacity used for heating only to apply for a permit to employ a competent person, etc., not a licensed engineer, and if recommended by two citizens, etc., and if found competent by the inspector of boilers and elevators, the permit is required to be granted. This section then goes on to provide for the punishment of persons who violate the provisions aforesaid. So that it will be seen that abundant provision exists in the charter of the city for the enactment of the ordinance aforesaid.

And there is no delegation of legislative power, because the board of engineers is required to examine the applicants for licenses as engineers. It would be contrary to the above-cited provisions of the charter <sup>570</sup> for the mayor and assembly to attempt to examine into the qualifications of applicants for the positions of licensed engineers. On the contrary thereof, the charter provides for the election or appointment of city officers authorized by charter or ordinance, and to such are deputed duties other than legislative.

Nothing is more common than for the proper men or boards to be appointed whose duty it is to examine applicants for licenses to various avocations or professions, and the fact that some degree of discretion is necessary in order properly to examine the qualifications of the applicants, and to discharge the duties of examiners, has never before been esteemed the delegation of legislative power. Such ordinances and examinations thereunder are in the nature of police functions. In *St. Louis v. Knox*, 74 Mo. 79, a similar ordinance was held valid, requiring application for a license for the sale of horses, etc., to be made through the board of police commissioners.

So, also, in *St. Louis v. Weitzel*, 130 Mo. 600, a similar ordinance was upheld which required that an applicant to the collector for license to haul garbage should first furnish to such collector a certificate of a certain character from the board of health.

Nor is it true that in the case at bar the granting or withholding of such license rests in the whim or caprice of the board of engineers, since the ordinance in express terms provides that "no person possessing such qualifications shall be refused a license." Even without such provision, if the board of engineers abused its discretion and refused, without reason to make the appointment, mandamus would lie to compel it to perform its duty: *St. Louis v. Weitzel*, 130 Mo. 600.

Numerous instances occur in our statutes where physicians are required to be examined before being licensed: Rev. Stats. 1889, sec. 6871; where lawyers must <sup>571</sup> be examined before obtaining license; dentists: Rev. Stats. 1889, sec 6889; druggists: Rev. Stats. 1889, sec. 4614; embalmers: Acts 1895, sec. 6, p. 174. In relation to the licensing of dentists this court recognized the validity of the statute: *State v. Fisher*, 119 Mo. 344. With regard to doctors, this court has sustained the legal force and effect of the statute: *State v. Hathaway*, 115 Mo. 36.

We take judicial notice of the dangers incident to the operation of steam engines and boilers when in inexperienced and unlicensed hands, and have no doubt as to the power of the city to take such measures as have been taken to provide by ordinances for the public safety. Such ordinances as the aforesaid merely prescribe regulations for the orderly conduct of a very necessary, and, if neglected, a very dangerous, business in the large centers of population.

The objection taken, and properly taken, to the ordinance in *Mayor etc. v. Radecke*, 48 Md. 217, 33 Am. Rep. 239, where the engineer was "to be removed after six months' notice to that effect from the mayor," was that it did not prescribe regulations, nor profess to do so, but, as said by the court in that case, "committed it to the unrestrained will of a single public officer, the power to notify every person who then employed a steam-engine in the prosecution of any business in the city of Baltimore, to cease to do so," and by providing compulsory fines for every day's disobedience of such notice and order of removal, rendered his power over the use of steam in that city practically absolute, so that he might prohibit it altogether." There is no such ordinance in this case; the rights of everyone entitled to a license as an engineer are fully protected and sedulously guarded.

We discover no constitutional question in this case, and judgment affirmed.

All concur.

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**MUNICIPAL CORPORATIONS—ORDINANCES REGULATING TRADES AND EMPLOYMENTS—LICENSES.**—A statute authorizing municipal authorities to license and regulate such callings, trades, and employments as the public good may require, will empower them to exact a license for revenue purposes if that construction is not inconsistent with the whole charter and the general legislation of the state: *Ex parte Frank*, 52 Cal. 606; 28 Am. Rep. 642. See *Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441; monographic note to *Robinson v. Mayor*, 34 Am. Dec. 638-640. But a municipal corporation has no power to make the right of a person to follow his business at any place he may select dependent upon the will of any number of citizens or property owners within its limits: *Ex parte Sing Lee*, 96 Cal. 354; 31 Am. St. Rep. 218, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MONTANA.**

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**CLARK v. LINDSAY.**

[19 MONTANA, 1.]

**SALES—DELIVERY—SHIPMENT.**—A seller who agrees to ship the goods sold to the buyer on or before a certain day complies with his contract when he delivers the goods on such date to a carrier for transportation on a regular line of transportation between the point of shipment and destination. He is under no obligation to ascertain that the carrier moves the goods toward their destination on the day specified.

Action to recover damages sustained by plaintiff's assignor, one Pendleton, by reason of the failure of defendants, Lindsay & Co., to receive and accept a carload of eggs and poultry shipped to them. Pendleton sold to defendant the eggs and poultry in suit and agreed to ship them on or before February 15, 1892, the defendant to pay the freight charges from Lawrence, Kansas, to Helena. Pendleton shipped and placed such produce on the cars of the Union Pacific Railway on February 15, 1892, as directed by defendant, and immediately notified him of the shipment on such date. The eggs and poultry did not arrive at Helena until February 23, 1892, when the defendant refused to receive or accept them, and in this suit claimed that the merchandise was not placed on the cars in time to be shipped from Lawrence on February 15, 1892, as agreed. Judgment for plaintiff. Defendant appealed.

H. C. Smith, for the appellant.

Smith & Word, for the respondent.

**3** HUNT, J. What was the contract entered into between the parties? If the respondent is correct, Pendleton did all he was obliged to do, when, on February 15th, he placed the merchandise involved in good condition on board the railroad cars at Lawrence, Kansas, to be transported to Helena, Montana.

**4** But if appellant, defendant, is correct, although it admits that the contract entered into between it and Pendleton is the same as set forth by Pendleton, it nevertheless avers it was agreed in and by said contract that the merchandise was to be delivered to the railroad company so that it could be shipped and leave Lawrence on or before February 15th, and that such shipment and departure were material parts of the contract.

Without reviewing the evidence, it is sufficient to say that the plaintiff's version of the agreement is fully supported. When plaintiff's assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done.

The signification of the word "shipment" is uniform. The Century Dictionary defines "shipment" as "the act of dispatching or shipping; especially the putting of goods or passengers on board ship for transportation by water. A quantity of goods delivered at one time for transportation whether by sea or by land": Black's Law Dictionary.

There was, therefore, no implied obligation on the part of the plaintiff's assignor to see that the merchandise left on the 15th. The argument of the appellant is very close to that advanced by defendants in the case of *Ledon v. Havemeyer*, 121 N. Y. 179. It was there contended that the word "shipment" meant a clearance of the vessel as well as putting the goods on board within the period allowed for shipment. But the court held otherwise, saying: "The words 'shipment' and 'shipped' are now used indifferently to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, over land as well as water, and imply with respect to carrying by land, a completed act, irrespective of the time or mode of transportation: *Caulkins v. Hellman*, 47 N. Y. 452; 7 Am. Rep. 461; *Fisher v. Minot*, 10 Gray, 260; *Schmertz v. Dwyer*, 53 Pa. 335. . . . **5** We have been referred to no authorities supporting the defendants' contention, and we believe it to be contrary to the invariable meaning of the word, as defined by

lexicographers, as understood by the mercantile community generally, or as laid down in the decisions of the courts."

The court charged the jury in harmony with the law as above stated, and submitted to their determination all the evidence bearing upon the actual agreement between the parties. They were told that if they believed that the contract was in effect that the goods were to be shipped by Pendleton on or before February 15th, and that Pendleton placed the goods on board the cars of the Union Pacific Railway Company at Lawrence on the said fifteenth day of February, then they should find that Pendleton had complied with his part of the contract; but if they believed that the agreement was that Pendleton was to deliver the goods so that they could leave Lawrence on the 15th, and they were not delivered in time to let the cars go forward on that date, they should find for the defendant. They were further told that if, however, they believed Pendleton placed the goods on board the cars on the 15th so that they could have left Lawrence on that day, then Pendleton complied with his contract and the plaintiff could recover. Thus the facts and the law applicable were fairly submitted to the jury, and their verdict for the plaintiff cannot now be disturbed.

We may say, too, that the appellant in the case is in no position to complain, for, under the construction of the contract that it contends for, it could not recover, inasmuch as it clearly appears by the testimony that the car was loaded on the night of the 15th at Lawrence, in time to have enabled the carrier to move it forward toward its destination—hence if there was any negligence at all, it was on the part of the railroad company, and did not lie in a breach of plaintiff's contract with defendant: *Hutchinson on Carriers*, sec. 89.

There being no error in the record, the judgment and order will be affirmed.

Pemberton, C. J., concurs.

De Witt, J., not sitting.

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**SALES—DELIVERY—SHIPMENT.**—The legal presumption is, that upon the delivery of goods to a common carrier the title there-to vests in the consignee, and the carrier, having the right to rely upon this presumption, in the absence of express notice from the consignor to the contrary, may settle with the consignee in case the property is lost, stolen, or destroyed: *Dyer v. Great Northern Ry. Co.*, 51 Minn. 345; 38 Am. St. Rep. 506, and note. When the contract of purchase is silent as to the method of delivery, a delivery by the vendor to a common carrier in the usual course of business, transfers the title to the vendee: *Magruder v. Gage*, 33 Md. 344; 3 Am.



Rep. 177. Contra, see Loyd v. Wight, 20 Ga. 574; 65 Am. Dec. 636. See, also, Railway Co. v. Murphy, 60 Ark. 333; 46 Am. St. Rep. 202, and note; Capehart v. Furman etc. Imp. Co., 103 Ala. 671; 49 Am. St. Rep. 60, and note.

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## SANFORD v. EDWARDS.

[19 MONTANA, 56.]

**PROCESS—SERVICE OF SUMMONS.**—Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued.

**PROCESS—SERVICE OF SUMMONS.**—A statute providing for service of summons by reading it to defendant personally, or by leaving a copy at his place of residence, is not sufficiently complied with by a delivery of a copy of the summons to the defendant personally, and a judgment rendered upon such service is without jurisdiction and void.

**PROCESS—EVIDENCE OF MANNER OF SERVICE OF SUMMONS.**—In an action on a justice's judgment brought in the district court, parol evidence is not admissible to show the manner of service of summons in the justice's court and that such service was made in compliance with the statute.

Action in the district court on a judgment rendered by a justice of the peace. The answer, among other things, set out the return of the officer made on the summons in the action before the justice, as follows: "I hereby certify that I received the within summons on the twenty-eighth day of February, 1887, and personally served the same on the twenty-eighth day of February, Anno Domini, 1887, upon Ada Edwards, being a defendant named in said summons, by delivering to said defendant personally in said county of Lewis and Clarke, a copy of said summons." The answer also alleged that such judgment was void for want of jurisdiction of the person of the defendant against whom the judgment was rendered by default. The replication to this answer alleged that the officer served the summons upon defendant by delivering a copy thereof to her at her residence. Defendant's motion for judgment on the pleadings was overruled by the court. On the trial, one White, a constable, testified, against the objection of defendant, that he served the summons upon the defendant by delivering a copy to her at the front door of her residence. At the close of plaintiff's evidence defendant moved the court for a nonsuit. This motion was overruled and judgment rendered for plaintiffs. Defendant appealed.

H. C. Smith and T. J. Walsh, for the appellant.

M. Bullard, for the respondents.

<sup>58</sup> PEMBERTON, C. J. The first question presented by this appeal is as to whether the constable's service of the summons issued by the justice was void. If the service of the summons was void, then it will not be disputed that the judgment of the justice, on which this suit is brought, was and is void also, as well as all proceedings thereunder.

Section 744 of the Code of Civil Procedure, Compiled Statutes, 1887, in force at the time of the service of the summons in question, and which must govern in the determination of the <sup>59</sup> case, after prescribing the manner of service of summons on corporations, minors, persons of unsound mind, etc., in subdivision 4 provides for service of summons in cases like the one under discussion, as follows: "In all other cases, by reading the same to the defendant personally, or by leaving a copy at his place of residence." It is conceded that in this case the constable did not read the summons to the defendant personally.

In *Brown on Jurisdiction*, section 41, page 110, it is said: "When the statute provides the form of service or mode of obtaining it, that mode must be pursued strictly." Statutes prescribing the manner of service are mandatory, not directory: *Wells on Jurisdiction of Courts*, sec. 97; *Freeman on Judgments*, 4th ed., sec. 125.

In *Robbins v. Clemmens*, 41 Ohio St. 285, under a statute requiring service to be made by delivering a copy, service was made by reading the summons to the defendant; the court held the service void, and that a judgment rendered on such service could be attacked collaterally.

In *Newlove v. Woodward*, 9 Neb. 502, the court held that "a summons must be served upon a defendant in the mode provided by the statute, in order to give the court jurisdiction, unless the defendant by an appearance waive the defect." To the same effect see *Campau v. Fairbanks*, 1 Mich. 152; *Young v. Capen*, 7 Met. 287.

In *Grand Tower etc. Co. v. Schirmer*, 64 Ill. 106, the court says: "The officer making the service was bound to pursue the requirements of the statute. He is not invested with the power to substitute another and different mode from that pointed out in the statute": See, also, *McCoy v. Crawford*, 9 Tex. 353; *Hart v. Gray*, 3 Sum. 339; *Mattison v. Smith*, 37 Wis. 333.

In fact, the authorities, if not absolutely uniform upon this question, seem to largely and strongly support the view that such service as we are here discussing is void, and that the judg-

ment rendered thereon is necessarily void also. We, at least, have been shown no authority to the contrary by counsel <sup>60</sup> for respondent, nor has our attention in any manner been called to any such authority.

We are, therefore, of the opinion that the constable's service of the summons issued by the justice was void, and gave the justice no jurisdiction of the defendant.

The court permitted the constable to testify in this case that he served the summons issued by the justice upon the defendant by delivering a copy thereof to her personally at the door of her residence. This is assigned as error. We think the action of the court was erroneous. The constable might, we think, have amended his return to show service in compliance with the requirements of the statute—if the facts warranted such amendment—in the justice court, where the original proceedings and judgment were had and entered. But in this suit, commenced in the district court, we do not think it was permissible to prove or show the manner of service in the justice's court by parol testimony. This parol offer of evidence was not an offer or effort to amend a return to conform to the facts, so as to show service in conformity with the statute—if such amendment could have been made in the district court. It was an attempt in one case and court to show by parol evidence that such service of summons was had on a defendant in another case and court as would authorize such other court to render the judgment in controversy. We think the admission of parol evidence to establish such fact was error: Code Civ. Proc., sec. 77, Comp. Stats. 1887; *Settlemeier v. Sullivan*, 97 U. S. 444; *Botsford v. O'Connor*, 57 Ill. 78; *Wellington v. Gale*, 13 Mass. 483; *Miller v. Plue*, 45 Neb. 701; *Brown v. Gaston*, 1 Mont. 57; *Dyas v. Keaton*, 3 Mont. 495; *Sawyer v. Robertson*, 11 Mont. 416.

We regard this question as settled by the great weight of authority in accordance with the foregoing view. If there are respectable authorities to the contrary, our attention has not been called to them.

Counsel for appellant concedes that the question of suing the defendant by a wrong christian name in the justice's <sup>61</sup> court is unimportant, and of itself would be unavailing on this appeal.

The judgment and order appealed from are reversed.

De Witt, J., concurs.

Hunt, J., disqualified.



**Jurisdiction—Defects in the Service of Process.**

*General Rule.*—In its decision in the principal case the supreme court of Montana recommitted itself to the principles sustained by its opinion in Choate v. Spencer, 13 Mont. 127, 40 Am. St. Rep. 425, heretofore reported, and adversely commented upon, in this series. In that case, the judgment was held void for a defect in the process itself, though it was evident that the form of such process was adequate to notify the defendant of the pendency of the proceeding against him, and that, if he did not appear and present his defense within the time designated, judgment would be entered against him, and therefore that the defects in the process could not have misled or otherwise prejudiced him, unless, in contemplation of law, he must be deemed prejudiced by any departure whatsoever from the directions of the statute. In the principal case, there was an objection to the process itself, in this, that the christian name of the defendant was incorrectly designated therein; this objection was by the court and counsel characterized as unimportant; but the court affirmed that, as the mode of the service of the process was not that required by law under the circumstances of the particular case, the judgment must be declared void, though there was no doubt that the summons was actually given to the defendant personally and under such circumstances that she must necessarily have understood that the acts done by the officer were believed by him to constitute a proper service, and that the plaintiff, unless the defendant appeared and made some objection to such service, would take judgment at the time and for the amount designated in the summons. The defect in the service, as disclosed by the return, consisted in the failure of the officer to read it to the defendant. It was not, under the statute of that state, necessary in all cases for the summons to be read to the defendant, for it might be served not only without reading it to him, but also without giving it to him personally, when its service was made by leaving a copy at his place of residence. The trial court permitted the officer serving the process to testify that the copy was delivered to the defendant at the door of her residence. This action of the trial court was by the appellate court deemed erroneous, though it was admitted that it would have been proper for the officer to have amended his return in the original case for the purpose of disclosing the true mode of service. The court in its opinion relied upon general statements made by textwriters and judges to the effect that, when the statute provides a form or mode of serving process, it must be pursued strictly. Language must, however, always be construed in connection with the circumstances under which it is used and the facts to which it is addressed, and we believe that the weight of authority will show that this strict rule respecting the mode of serving process is applicable only when such service is questioned in the original action, either by motion to vacate it or by appeal, though, doubtless, decisions may be found in support of that in the principal case. We are, nevertheless, somewhat surprised at the statement found in the opinion of the court: "We have been shown no authority to the contrary by counsel for respondent, nor has our attention in any man-

ner been called to any such authority." We had hitherto believed that the decided weight of authority affirmed the existence of a substantial difference between a want of jurisdiction and an irregularity in procuring it, and that if there were an irregularity, either in the process or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending: *Whitwell v. Barbier*, 7 Cal. 54; *Drake v. Duvenick*, 45 Cal. 455; *Ex parte Stearnes*, 77 Cal. 156; 11 Am. St. Rep. 251; *Stout v. Woods*, 79 Ind. 108; *Schee v. La Grange*, 78 Iowa, 101; *Pratt v. Western etc. Co.*, 27 Iowa, 363; *De Tar v. Boone County*, 34 Iowa, 488; *Myers v. Davis*, 47 Iowa, 325; *Isaacs v. Price*, 2 Dill. 347; *Freeman on Judgments*, sec. 126. "The effect of an insufficient writ upon the subsequent proceedings cannot be essentially different from the effect of an improper service or a failure of service upon the defendant. Defects of that character often furnish a cause for reversal by writ of error of judgments rendered by justices of the peace as well as of superior courts. And we are satisfied that for errors in the mode only of exercising the jurisdictional authority vested in a justice of the peace the writ of error is the appropriate remedy by which to set aside the judgment, and that, until so set aside, the parties are concluded by it": *Hendricks v. Whittemore*, 105 Mass. 30. Though we are cited in the opinion of the court as authority for the conclusion reached by it, we can see nothing in the section cited sustaining the views of the court, and both our language and the authorities cited in the succeeding section of our work on judgments clearly show that there was no reason for citing that work in support of the decision in the principal case. Of the cases cited in the opinion in the principal case in support of its views several do not, in fact, support them, because in them the question was not presented collaterally, but either by motion in the original case, or upon appeal, or by certiorari, or by bill in equity to obtain relief upon equitable grounds. The cases, however, cited from Texas, from Ohio, and from 3 Sumner are in point, and we must hence admit a conflict of authority upon the subject.

The service of process may be defective, either because made by a person incompetent to make it, or upon a person not authorized to receive it, or at a time when or a place where the service was unauthorized, or when some of the acts prescribed by law are omitted, or when the mode of service resorted to is authorized under exceptional circumstances, but they are not shown to have existed. Whenever there is a defect in any substantial particular in the service of process, a judgment rendered thereon by default will generally be reversed on appeal (*Powers v. Braly*, 75 Cal. 237; *Beckett v. Cuenin*, 15 Colo. 281; 22 Am. St. Rep. 399; *Seedhouse v. Broward*, 34 Fla. 509; *Shrader v. Shrader*, 36 Fla. 502; *Law v. Grommes*, 158 Ill. 492; *Davidson v. Clark*, 7 Mont. 100; *McConkey v. McCraney*, 71 Wis. 576), will sometimes be vacated on certiorari (*Rasch v. Moore*, 57 Mich. 54), or upon motion made in the original action (*Barney v. Vigoureaux*, 75 Cal. 376; *Guarantee etc. Co. v. Buddington*, 23 Fla. 514), and the service itself will always be vacated upon motion interposed before final judgment, unless the party objecting has,

In the meanwhile, entered his appearance in the action or has by his gross laches or otherwise voluntarily waived the irregularity of which he complains: *Correll v. Granget*, 12 Misc. Rep. 209; 34 N. Y. Supp. 25; *Falvey v. Jones*, 80 Ga. 130.

*The Persons by Whom Service of Process may be Made* are generally designated by statute. The return or other competent evidence of the service may either fail to show whether the person making it was authorized to do so or may affirmatively disclose that he was not one of such persons, or, though one of them, that he was disqualified to act in the particular case. If the service was made by one acting as a public officer, whether as principal or as deputy, we think there is no doubt that it cannot be avoided or the judgment disregarded on the ground that he was not entitled to the office or had not qualified therefor, as prescribed by law; for, as a general rule, the right of an officer de facto cannot be questioned in a collateral action, but only in some proceeding to try his title to the office: *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541. If the person making the service is required to be of a particular age or to possess some other qualification, or, if to authorize him to act, proof of special facts should have been made, and the return or other proof of service found in the record or among the papers upon this subject is silent, there is no presumption of the nonexistence of facts authorizing the process to be served by the person serving it, and the judgment cannot be collaterally avoided: *Dorente v. Sullivan*, 7 Cal. 279; *Peck v. Strauss*, 33 Cal. 678; *Railway Co. v. Brooks*, 90 Tenn. 161; 25 Am. St. Rep. 673. The service may have been made by the plaintiff himself acting in an official capacity. It was formerly held in New York that his being a party to the action did not divest him of authority to execute process therein: *Putnam v. Man*, 3 Wend. 202; 20 Am. Dec. 686; *Tuttle v. Hunt*, 2 Cow. 436. These decisions, in so far as they maintain that the service of process by a party himself is proper and cannot be avoided, though assailed by a timely motion, seem to us unsound. By later cases in the same state it has been declared, however, that, conceding such a service to be unauthorized, it does not make the judgment void: *Myers v. Overton*, 2 Abb. Pr. 344; *Hunter v. Lester*, 18 How. Pr. 347. A statute was thereafter enacted forbidding officers to make service of process in suits in which they were parties, and under this statute it has been held that service of process made in violation thereof was entirely ineffective and could not support a judgment based thereon, even when assailed collaterally: *Decker v. Ekelman*, 12 Misc. Rep. 665; 41 N. Y. Supp. 412; *Warring v. Keeler*, 24 Civ. Proc. Rep. 427; 11 Misc. Rep. 451; 33 N. Y. Supp. 415; and this conclusion was sustained by decisions made in Kentucky under a somewhat similar statute: *Knott v. Jarboe*, 1 Met. 504; *Chambers v. Thomas*, 3 A. K. Marsh. 536. We have not met with any decisions involving the question of the effect of the service of process made by one not a party to the action, but who, nevertheless, was incompetent to serve it, where the fact of his want of competency appears from the return or some other paper on file in the case.

*Time of Service.*—Until an action is commenced, there is no authority to issue or serve process therein, and it has been said that



service of process so made is void: *Ellis v. Fletcher*, 40 Mich. 321; *South Bend etc. Co. v. Mannahan*, 62 Mich. 143; though the question was not necessarily presented in these cases, for the reason that they did not involve any collateral attack upon the judgments assailed. If by statute the service of process upon a Sunday or other holiday is made unlawful or expressly forbidden, such service is probably entirely inoperative, and hence inadequate to sustain a judgment based thereon: *McLaughlin v. Wheeler*, 2 S. Dak. 379. See, also, *Scammon v. Chicago*, 40 Ill. 146; *Shaw v. Williams*, 87 Ind. 158; 44 Am. Rep. 756.

*Premature Entry of Judgment.*—The service of process, though not made on a holiday nor at any other time forbidden by law, may, perhaps, be regarded as not made at a proper time when it was so made that the defendant was not allowed, before the entry of the judgment against him, the time within which the statute permits him to appear and interpose his defense. This irregularity may have resulted from a defect in the process itself in that it required the defendant to appear within a shorter time than the law sanctions, or, when the law requires the process to be served a specified length of time before the entry of judgment, from an error of the officer or other person making the service in not making it so that length of time can intervene before the date fixed for the entry of the default or judgment. The rule sanctioned by the decided weight of authority is, that when the process is served upon the defendant, the court whence it issued thereby acquires jurisdiction over it, so that its subsequent action in entering judgment against him prematurely or without giving him the time within which he was entitled to plead, while it is certainly erroneous and irregular, is not void, and therefore the judgment is not subject to collateral attack on account of such error or irregularity: *Whitwell v. Barber*, 7 Cal. 54; *McDonald v. Tutty*, 99 Ga. 184; *Lyons v. Coolidge*, 89 Ill. 529; *McAlpine v. Sweetzer*, 76 Ind. 78; *McCormick v. Webster*, 89 Ind. 105; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527; *Nelson v. Becker*, 14 Kan. 509; *Anheuser-Busch etc. Assn. v. McGowan*, 49 La. Ann. 630; *Glover v. Holman*, 3 Heisk. 519. "The general rule upon this subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void and may be overthrown by a collateral attack. If a court having jurisdiction of the subject matter and required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given; and this is so, although the record shows a defective and irregular notice": *Muncey v. Joest*, 74 Ind. 412. In the case in which this language was used, it appeared that in certain proceedings respecting an assessment to be levied upon land, a notice was required to be published for twenty-eight days, but that the actual period of publication was twenty-seven days only, and the proceedings based upon such publication were, nevertheless, adjudged to be valid. It is, however, extremely doubtful whether the rule which we have stated is applicable to the constructive service of process.

We think that the better opinion is, that when process is authorized or required to be served by its publication for a stated period, that publication for a less period is entirely ineffective, and where the inefficiency of such publication appears by the record or the papers on file in the cause, the court, in any action based upon such inadequate publication, must be regarded as proceeding without jurisdiction, and its judgment may, therefore, be treated as void: *McDonald v. Katz*, 31 Cal. 167; *Fleming v. West*, 98 Ga. 778; *Waters v. Waters*, 27 N. Y. Supp. 1004; 7 Misc. Rep. 519.

*The Place of Service.*—From the long-established rule that the jurisdiction in personam of the courts of a state or county is confined to persons within its territorial limits, it follows that service of process made beyond such limits is entirely ineffective to confer jurisdiction over the persons against or upon whom it is so made: *Ward v. Boyce*, 152 N. Y. 191; *Pennoyer v. Neff*, 95 U. S. 714; *Mexican etc. Ry. Co. v. Pinkney*, 149 U. S. 194. If, on the other hand, process is personally served on the defendant within the territorial jurisdiction of the court whence it issued, we incline to the conclusion that such service is sufficient to confer jurisdiction upon the court, though not made at the place authorized by statute. If, as often happens, the service is constructive, rather than personal, and it appears that certain acts constituting a part of such service did not occur at any of the places designated in the statute, the service will generally be regarded as insufficient to give the court jurisdiction. Thus, if the statute authorizes service to be made upon a corporation by delivering process to a designated officer thereof in the county in which he resides, a judgment against a corporation, based upon a service upon such an officer not appearing to have been made within the proper county, may be annulled by certiorari: *Taylor v. Ohio R. R. Co.*, 35 W. Va. 328; or, though not so annulled or otherwise vacated, may, perhaps, be disregarded as void: *Railway Co. v. Ryan*, 31 W. Va. 364; 13 Am. St. Rep. 865. In *Pomeroy v. Rand*, 157 Ill. 176, where a judgment in garnishment proceedings was claimed to be void on the ground that the constable was required to post three copies of a notice at three public places in the neighborhood, at least ten days before the day set for the trial, and that the return, while it stated in general terms the posting of these copies at three public places, did not name such places, the court said that the return was defective in the respects indicated, yet that these omissions were not "of sufficient importance to render the judgment absolutely void." This case cannot, in our judgment, be reconciled with the weight of authority upon the subject, except by the assumption that, though the officer's return did not disclose in detail the acts done, yet, if it were true, they were all the acts required by the statute; for if, as a part of the constructive service of process, copies thereof, or certain notices, are required to be posted at specified places, and the return found in the record shows that they were not so posted, or falls to show whether they were posted or not, the court, in rendering judgment based upon such return, must be regarded as acting without jurisdiction: *Cory v. Dennis*, 93 Ala. 440. Where a statute required one copy of the summons to be posted for three weeks at the courthouse door of the county and



two copies in public places in the township where the land is situated, and the return of the sheriff was to the effect that he served the summons by posting a copy "in two public places in the township in which the real estate in the complaint is situated, and one copy on the courthouse," it was held that the return was insufficient to sustain the judgment, because it failed to show that any copy was posted at the door of the courthouse for three weeks or for a single day, and also failed to show that two copies were posted in the township for three weeks or for any specified period of time: *Pioneer etc. Co. v. Maddux*, 109 Cal. 633; 50 Am. St. Rep. 67.

*The Person upon Whom Service may be Made.*—It is, of course, competent for the legislature to authorize the service of summons to be made upon any person over whom the courts of the state may exercise jurisdiction, regardless of his age and mental or other condition, and it may, doubtless, dispense with a personal service upon a defendant who is represented by some agent appointed by himself or otherwise legally constituted and authorized to represent him. If the defendant is an artificial person, service must, necessarily, be made upon its officer or agent. If the defendant is insane, or, because of infancy or some other disability, is by law not deemed competent to represent and care for his own interests, doubtless the legislature may provide that service of process must be made upon his guardian or some other person designated by law to represent him and to protect his interests; and whenever the statute requires the service of process to be made upon a designated person, the court cannot be regarded as having jurisdiction when it appears that the process has not been so served, though it may have been served upon some other person, and the fact of such service may have come to the knowledge of the defendant or the other person upon whom the service was required to be made. Thus where a husband and wife are defendants, jurisdiction over her cannot be acquired by the delivery of two copies of the summons to her husband, with the request that he deliver one of them to her, though she is at the same time in the house with her husband, if it further appears that such copy was not delivered to her, and that she had no notice of the suit: *Holliday v. Brown*, 34 Neb. 232. In truth, if the summons is not served upon the defendant, it is not material that he knows of its service upon another person, as where that person, after receiving a copy of the summons, mails it to the defendant with a letter explaining the mistake: *Savings Bank v. Authier*, 52 Minn. 98.

*Service of Process upon a Corporation* must necessarily be made upon some of its officers or agents. In the absence of a statute designating upon what officer or agent service of process may be made, it is sufficient that the officer or agent sustain such a relation to the corporation, "as to be capable of receiving notice for it in respect of the matter of the suit": *Thompson on Corporations*, sec. 7505. It is not within the scope of this note to consider upon whom the service of process against a corporation may be made, but rather to inquire what is the effect of the service when confessedly not made upon that officer or agent. Judge Thompson, in his work on *Corporations*, declares that: "Where a particular method of service of pro-



cess upon a corporation is pointed out by statute, that method must be followed; and where the statute designates an officer or agent upon whom process is to be served, it must be served upon that officer or agent in order to give the court jurisdiction. Statutes of this kind are not regarded as directory, but as mandatory and exclusive; hence, where the statute prescribes a method of service, a method not included therein will not be good, although it might have been good at the common law. Thus, if a statute designates certain officers or agents upon whom writs may be served, the service upon another agent, or even upon a person in possession of the property of the corporation sought to be affected by the suit, will not give jurisdiction": Thompson on Corporations, sec. 7503. The cases cited in support of these declarations were, many of them, cases in which the defect in the service of process was urged either upon appeal, or upon some motion to set aside such service or to vacate a judgment based thereon, or by a suit in equity to obtain relief from such a judgment on the ground that it was inequitable and was entered without any notice being given to the corporation: Great West Min. Co. v. Woodmas etc. Co., 12 Colo. 46; 13 Am. St. Rep. 204; Chambers v. Bridge Mfy., 16 Kan. 270; Southern Express Co. v. Craft, 43 Miss. 508; and there can be no doubt that, when so assailed, such a service must be set aside or other appropriate relief be granted. We doubt, however, whether it is always true that service of process against a corporation in which the method of service prescribed by statute is not followed necessarily fails to give the court jurisdiction in the sense that its subsequent proceedings may be treated as void. If the person upon whom service was made was neither an officer nor an agent of the corporation, there can be no doubt that this presents a case, not of a defective service of process, but of an entire absence of service, and hence cannot support a judgment based thereon: Campbell etc. Co. v. Marder, 50 Neb. 283; post, p. 573. If the service of process is made on an officer or agent of a corporation, though not one of the officers or agents designated by law for such purpose, and it is no part of his duties to defend actions against the corporation, nor to employ counsel to do so, nor to advise or inform officers who are charged with such duties, the service on him cannot affect or prejudice the corporation, or give the court jurisdiction over it: Alexander v. Fairfax, 95 U. S. 774. If, on the other hand, his duties are such as to require him to act for the protection of the corporation, and whether they are such or not, if he informs the officers whose duty it is to act of the service on him, and they know that it was intended as a service on the corporation, and will be relied on as such, we apprehend that they cannot remain inactive, interposing no objections and permitting judgment not only to be entered, but to remain unquestioned, and then, whenever some right is claimed under it, assail it as absolutely void, though we admit we have found no decision upon this precise question. If the person upon whom process against a corporation was served was a de facto officer, the service cannot be avoided by proving that he was not an officer de jure: Stillman v. Associated etc. Co., 35 N. Y. Supp. 1071; 14 Misc. Rep. 503.

*On Infants and Lunatics.*—Courts have jurisdiction over infants and lunatics as well as over persons of mature years and of sound mind, and service of process may, therefore, be made upon such persons personally. If the defendant is a lunatic who has not been judicially declared of unsound mind, and for whom no guardian has been appointed, the service of process upon him gives the court jurisdiction over him, and a judgment based thereon cannot be avoided either upon the ground that he was a lunatic, or because no guardian ad litem was appointed to represent him and protect his interests: *Dunn v. Dunn*, 114 Cal. 210; *Freeman on Judgments*, sec. 152. If the defendant is an infant or a lunatic, judicially ascertained and declared to be such, the statutes generally provide that process, in addition to being served on such defendant, shall also be served on his guardian, if there be one, or upon his father, or mother, or a person with whom he resides, or upon some other person who will probably assist in making his defense or otherwise take such measures as are necessary to protect his interests. If the process, though served upon some of the persons whom it is thus required to be served, is not served upon all, such service is unquestionably defective. Whether it is void must be deemed an unsettled question. In one state, such a service was adjudged to be void against minor defendants, because the process was not also served upon their mother, though she was a party defendant in the same action, and, as such, personally served with summons therein: *Helms v. Chadbourne*, 45 Wis. 66. Elsewhere a service of this character under such circumstances has been held to be regular, for the service upon the mother or other representative of the minor in her personal capacity as a party defendant in the action rendered the service upon her of another copy of the summons in her representative capacity a mere superfluity: *Sanders v. Godley*, 23 Ala. 473; *Mullins v. Sparks*, 43 Miss. 129; *Smith v. Pattison*, 45 Miss. 619. In Iowa, if process is served on an infant defendant personally, the failure to also serve it upon his father, mother, or guardian is treated as a mere defect in the service of process, not sufficient to deprive the court of jurisdiction to proceed with the action: *Myers v. Davis*, 47 Iowa, 325; *Moomey v. Maas*, 22 Iowa, 380; 92 Am. Dec. 395. The statutes of the various states usually provide for the appointment of a guardian ad litem for an infant defendant who has no general guardian. Jurisdiction of such defendant is, however, acquired by the service of summons upon him, and the failure of the court to thereafter appoint a guardian ad litem is an error or irregularity rendering the judgment voidable, but not void: *Myers v. Davis*, 47 Iowa, 325; *Crogham v. Livingston*, 17 N. Y. 218; *McMurray v. McMurray*, 66 N. Y. 175.

*Omission of Some Act.*—Process may be served by the person, at the time, in the place, and upon the party designated by law, but some act prescribed by the statute may be omitted, and the service hence assailed as void. The tendency of judicial opinion, when there is a mere technical defect in the service which is not called to the attention of the court by any motion or by any appellate or corrective proceeding, is to hold that such a defect does not deprive

the court of jurisdiction, and therefore that its judgment cannot be deemed void. It was said in *Campbell etc. Co. v. Marder*, 50 Neb. 203, post, p. 573: "If an attempt at service is made and actually reaches the defendant, although it be not made or returned in the form and manner required by law, there is presented a case where jurisdiction attaches so far as to render the judgment good against collateral attack. But where the attempted service does not reach the defendant at all, there is no service, and the proceedings are void." This statement of the rule is, doubtless, too liberal, unless accompanied with some definition or qualification of the words "actually reaches the defendant"; for, where the service of process is directed to be made on him personally, it is clear that he need take no notice of service made in some other manner, as by leaving the process at his residence; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301; or by giving it to some other person, though the defendant is informed of it, and the process which has been so served is mailed or otherwise sent to him. There is here no attempt to serve the defendant personally. There is an entire absence of such service, instead of a defect in making it; none of the acts essential to such service has been performed by the person charged with the duty of making it. If such person, however, has performed some of the acts requisite to a valid service, the court whose process is thus served is vested with jurisdiction to determine whether such acts are sufficient, and by entering judgment it must be deemed to have so determined, and its judgment is, therefore, not void. If, on the other hand, personal service on the defendant is made, though not in the mode prescribed, he cannot safely disregard it, as where the officer, instead of giving the defendant a copy of the summons, read it to him: *Gandy v. Jolly*, 35 Neb. 711; 37 Am. St. Rep. 460; or where the return states that the summons was read in the presence and hearing of the defendants, instead of stating it was read to them, and also failed to state that a copy was delivered, or offered to be delivered, to them: *Myers v. Davis*, 47 Iowa, 325; or where the summons was read to the defendant's clerk under a mistaken belief that such clerk was the defendant, the latter, however, being aware of the officer's mistake and within hearing of such reading: *Metzger v. Huntington*, 51 Ill. App. 377. Where the officer serving a copy of the summons on defendant is required to certify it to be a true copy, the omission of such certificate from the copy served does not render a judgment by default based thereon void: *Friend v. Green*, 43 Kan. 167. Though a copy of the complaint is required to be served with a copy of the summons, the omission to serve it is a mere irregularity, not fatal to the jurisdiction of the court: *Dew v. Cunningham*, 28 Ala. 466; 65 Am. Dec. 362; *Munch v. McLaren*, 9 Wash. 676.

*Service of New or Amended Pleadings.*—If, during the progress of a cause, amendments are made to the complaint, or a cross-complaint or a complaint of intervention is filed, asserting some cause of action not stated in the original complaint, it is obvious that some notice thereof must be given to the persons to be affected thereby, to justify the granting of relief against them. This is usually accomplished by the service of a copy of the new or amended pleading on such parties, and unless by this or some other proceeding



recognized by law jurisdiction is obtained to hear and determine the new matters asserted therein, any judgment based thereon is a nullity: *Stewart v. Anderson*, 70 Tex. 588; *Roller v. Ried*, 87 Tex. 69.

*If Service of Process is Constructive*, rather than actual or personal, greater strictness of proceeding is usually exacted than when the mode of acquiring jurisdiction is more clearly according to the course of the common law. Hence, at least a substantial compliance with the statute is indispensable to the acquisition of jurisdiction. In such cases, the defendant cannot be presumed to know what has been done, nor from his inaction can any just inference arise that, knowing of an irregularity, he intended to waive it. If the statute permits the service of process to be made by leaving a copy thereof at the usual place of abode of the defendant, a return showing such service at the usual place of abode of the defendant when in the city of G. cannot sustain a judgment against collateral attack: *Brown v. Langlois*, 70 Mo. 226.

If the service of process may be made in a particular mode only in exceptional circumstances, its service in that mode when such circumstances are not shown to exist is generally invalid. Thus there can be no valid service of process, whether actual or constructive, on a defendant who is beyond the jurisdiction of the court which will sustain a judgment in personam against him: *Potter v. Ogden*, 136 N. Y. 384. The property of a nonresident defendant may be attached, and, if so, summons may be served upon him beyond the limits of the state, either personally or by publication, or in any other mode designated by statute, and a judgment thereon entered under which the property attached may be sold and applied to the satisfaction of the judgment, but, to justify such a judgment, it must appear that the case was a proper one for an attachment, that such attachment issued in the action, and was levied upon the property sought to be sold under the judgment. Otherwise, the service of process beyond the state, by whatever mode made, or attempted to be made, is unauthorized and void: *Henkle v. Holmes*, 97 Iowa, 695; *Reed v. Chilson*, 142 N. Y. 152; *Mullen v. Norfolk etc. Co.*, 114 N. C. 8; *Bernhardt v. Brown*, 119 N. C. 506; *Willamette etc. Co. v. Hendrix*, 28 Or. 485; 52 Am. St. Rep. 800; *Tillinghast v. Boston etc. Co.*, 39 S. C. 484.

*The Service of Summons by Publication* is not according to the usual course of proceeding, and is not authorized except in special circumstances designated in the statute. Generally, an affidavit is required to be made and filed showing the existence of such circumstances, and upon such affidavit, the court, or a judge thereof, is authorized to direct the service of summons by publication, and to determine in what newspaper and for what length of time the publication shall be made, and whether any copy of the summons and complaint shall be mailed to the defendant, and the place to which they shall be directed. Sometimes, as in California, this affidavit and order are not, by statute, made any part of the record in the case. Hence, after the entry of the judgment, the defendant may not be able to produce competent evidence for the purpose of proving that the service of process by publication was unauthorized. The rule

generally applicable is, that the constructive service of process may be sustained only in the cases pointed out by the statute, and that where it appears that the judgment was founded upon such service, it must further affirmatively appear that it was authorized, and that if there was no order of the court or judge that summons might be so served, or, though there was such an order, no affidavit can be shown to justify or support it, the mode of service resorted to is entirely unavailing, and the judgment based thereon absolutely void: *Chase v. Kaynor*, 78 Iowa, 449; *Shields v. Miller*, 9 Kan. 390; *Harris v. Claffin*, 36 Kan. 543; *Colton v. Rupert*, 60 Mich. 318; *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836; *Charles v. Morrow*, 99 Mo. 638; *Harness v. Cravens*, 126 Mo. 233; *Alderson v. Marshall*, 7 Mont. 288; *Palmer v. McMaster*, 8 Mont. 186; *Holmes v. Holmes*, 15 Neb. 615; *Coffin v. Bell*, 22 Nev. 169; 58 Am. St. Rep. 738; *Yorke v. Yorke*, 3 N. Dak. 343; *Finch v. Frymire* (Tenn. Ch. App.), 36 S. W. Rep. 883; *Beaupre v. Brigham*, 79 Wis. 436; *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198; *Oelbermann v. Ide*, 93 Wis. 669; 57 Am. St. Rep. 947; *Adams v. Hecksher*, 80 Fed. Rep. 742. If the summons is thus directed to be mailed to the defendant at a place named in the order, as well as to be published, such mailing is a substantial part of the service of process, and, if omitted, such process is not served, and hence a judgment based on the publication alone is void: *Schart v. Schart*, 116 Cal. 91; *Roberts v. Roberts*, 3 Colo. App. 6; *Dennison v. Blumenthal*, 37 Ill. App. 385. A judgment cannot be collaterally avoided by proving that the defendant did not receive the summons which was mailed to him, nor that the place to which it was mailed was not his place of residence, if it was the place to which the court by its order directed the mailing, or, where the order was silent upon that subject, was the place at which the plaintiff believed the residence of the defendant to be: *Hunter v. Ruff*, 47 S. C. 525; 58 Am. St. Rep. 907; *Martin v. Pond*, 30 Fed. Rep. 15.

*Evidence to Establish Jurisdiction.*—Though the facts respecting the service of process disclosed by the return or other evidence thereof on file are not sufficient to establish a valid service, still the judgment may be sustained, even when entered by default, by proof of the actual existence at the time of such entry of the requisite jurisdictional facts. Of this there is no doubt when the proof is sought to be made by an amendment of the return when it is the return of an officer, or by filing a new or amended affidavit when the mode of proving the jurisdictional facts is by affidavit: *Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145; *Hibernia etc. Soc. v. Matthai*, 116 Cal. 424; *Burr v. Seymour*, 43 Minn. 401; 19 Am. St. Rep. 245; note to *Reinhart v. Lugo*, 21 Am. St. Rep. 52; *Hopkins v. Baltimore etc. Ry. Co.*, 42 W. Va. 535. It is, in effect, held in the principal case that this mode of proof is exclusive, and therefore, in the absence of such amended proof, extrinsic evidence is not admissible to support the judgment by establishing the existence of the required jurisdictional facts. We have met with no other case discussing this precise question. We are unable to conceive that the mode of proof can be material, provided it satisfies the court or jury called upon to inquire what were the real facts, and the evidence is such as might

properly be admitted to aid in the determination of any other issue of fact. In truth, we should regard testimony given by witnesses in open court, where the parties in interest can be granted the benefit of a cross-examination, as more likely to satisfactorily establish the real facts than official returns or ex parte affidavits, and we know that in other cases the testimony of witnesses when offered has been accepted and acted upon: *Whitwell v. Barbler*, 7 Cal. 54; *Kipp v. Fullerton*, 4 Minn. 473.

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### AMES v. HESLET.

[19 MONTANA, 188.]

**CORPORATIONS—INSOLVENT—PREFERENCES BY.**—An insolvent corporation may make an assignment for the benefit of creditors, with preferences.

**CORPORATIONS—ASSETS AS TRUST FUND.**—The creditors of a corporation have no lien upon its assets as a trust fund held for their benefit.

Action by judgment creditors of an insolvent corporation to set aside an assignment made by it giving a preference to certain creditors. Judgment for the defendants and plaintiffs appealed.

Forbis & Forbis and Bangs, Wood & Bangs, for the appellants.

Corbett & Wellcome, for the respondents.

189 BUCK, J. The determination of this appeal depends upon whether or not an insolvent corporation can make an assignment for the benefit of creditors, with preferences. Appellants' counsel insist that such an assignment is void. Their reasoning is substantially as follows: The assets of the corporation constitute a trust fund for its creditors, to which equitable liens at once attach in favor of each and every creditor upon insolvency. An insolvent corporation stands upon a different footing from an insolvent individual, because with insolvency the legal existence of the former is virtually at an end, while in the case of the latter he may subsequently accumulate property, and pay all his debts. They and the judges and textwriters who support this view urge that it is most unjust and illogical to hold that such a corporation, by an assignment of its entire property—an act which in itself prevents any resumption of business operations—should be permitted to favor one lienholder at the expense of another.

There are innumerable authorities replete with arguments for and against this contention, and it would be an act of super-



erogation for us in the present opinion to enter into an elaborate discussion of a subject which has been so thoroughly exhausted. For the details of the arguments pro and con, we cite the following, among the many called to our attention: 2 Morawetz on Private Corporations, secs. 782, 786, 863; 5 Thompson on Corporations, secs. 6466, 6492-6496; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 143; 22 L. R. Ann. 802, note; Thompson v. Huron Lumber Co., 4 Wash. 600; Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493; 15 Am. St. Rep. 644; 4 Am. & Eng. Ency. of Law, 1st ed., 220, note; 2 Cook on Stocks and Stockholders, sec. 691. The great <sup>190</sup> weight of authority is against appellants, and, in our opinion, is based on the better line of reasoning. In many of the cases cited, particularly those in federal courts, the statement is made that the assets of a corporation are a trust fund for its creditors; but it does not follow that even these courts intended by this expression to hold that creditors, by virtue of their mere attitude as such, have any lien upon the actual tangible property of a corporation—that property which belongs to it for its business operations, and which is primarily liable for its debts, as distinguished from any secondary liability of directors or stockholders. In our opinion, there is no such lien. The trust fund doctrine, as invoked by appellants to sustain it, impresses us as an unsubstantial theory, constructed of judicial expressions selected without regard to their context or the facts in reference to which they were uttered. We refer, of course, to the cases where the adoption of the doctrine only appears inferentially. All this reasoning against upholding preferences in assignments by insolvent corporations should be addressed to legislatures, rather than the courts. The policy of allowing such preferences may be pernicious, even more so than that of allowing an insolvent individual to prefer creditors; but in the one class, as in the other, it is for the legislature to decide the question of policy, not the courts. There was nothing in the statutes of Montana in force when this controversy arose forbidding such assignments; and, according to a large majority of the authorities, insolvent corporations and insolvent individuals are upon the same plane at common law in respect to them. As to any distinction between the status of a solvent and insolvent corporation in this connection, this court held in Gans v. Switzer, 9 Mont. 408, that the fact that an insolvent corporation had trans-

ferred all its property to one of its creditors, and abandoned business, did not dissolve it. For these reasons, the order denying the motion for a new trial and the judgment of the lower court are affirmed.

Pemberton, C. J., and Hunt, J., concur.

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**CORPORATIONS—INSOLVENT—RIGHT TO PREFER CREDITORS.**—A corporation, though insolvent, may, where it has possession and control of its property, and in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property, or by a mortgage, sale, assignment, or otherwise: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 76, 77.

**CORPORATIONS—INSOLVENT—ASSETS AS TRUST FUND.**—The only sense in which it can be said that the assets of an insolvent corporation are trust funds when in the hands of the managing board of directors is that the assets must be used in the discharge of corporate obligations before any portion can be absorbed by the directors in payment of stock or certificate obligations to the stockholders, whether they be director or nondirector stockholders: *Butler v Harrison etc. Co.*, 139 Mo. 467; ante, p. 464, and note.

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## NATIONAL CASH REGISTER COMPANY v. BROWN.

[19 MONTANA, 200.]

**PARTNERSHIP—LIABILITY OF RETIRING PARTNER.**—A retiring partner remains liable to firm creditors for firm debts notwithstanding an agreement between him and the remaining partners, or with the new firm, that they will assume and pay all such debts, provided such creditors are not parties to such agreement.

**PARTNERSHIP.—THE LIABILITY OF A RETIRING PARTNER** to firm creditors is that of principal and not of surety.

**DEBTOR AND CREDITOR.—ONE OBLIGOR CANNOT CHANGE HIS RELATION TO HIS CREDITOR** by any agreement with his joint obligor without the creditor's assent.

**PARTNERSHIP—LIABILITY OF RETIRING PARTNER.**—In an action by a firm creditor against a retiring partner to recover a firm debt, the fact that such creditor has released an attachment against the property of the remaining insolvent partner is no defense, although such release was made against the protest of the retiring partner and with knowledge of the insolvency of the remaining partner.

Action to recover on promissory notes made by Brown & Co., a partnership. J. A. Brown of said firm defaulted, and judgment was rendered against him. R. D. Alton, formerly of said firm, appeared and filed a separate answer alleging in substance as follows: He admitted the execution of said notes by such firm and his former membership therein; but alleged that on April 7, 1894, said firm was dissolved, by agreement in writing,

by the terms of which said Alton retired from said firm, and said Brown continued the business thereof, took all its assets, agreed to collect all accounts due, and to pay all indebtedness of such firm, among which were the notes sued upon; that on November 19, 1894, plaintiff commenced an action in the justice's court to recover on said notes, and attached sufficient property of said Brown to satisfy such notes and costs; that plaintiff then knew of the dissolution of the firm and of the agreement, between the partners as aforesaid, and of the insolvency of said Brown; that plaintiff was urged and requested by defendant, Alton, to proceed with said suit, and make the amount of the notes out of the property of Brown then held under attachment, but that defendant disregarded such requests and demands of plaintiff, and, with knowledge of all the facts, released said property from attachment and dismissed the suit. A demurrer to this answer was overruled in the justice's court, and judgment rendered in favor of Alton. Plaintiff appealed to the district court and recovered judgment, from which Alton appealed.

Campbell & Stark, for the appellant.

E. C. Day, for the respondent.

**203** PEMBERTON, C. J. The appellant contends that by the terms of the dissolution of the partnership firm of J. A. Brown & Co., as set out in his separate answer, he became a surety for the payment of the firm's debts, and that he was entitled to the rights of such surety from the creditors of the firm having actual notice of the terms of the dissolution; and, further, that the plaintiff, having brought suit by attachment against the firm, and having attached sufficient property in the hands of Brown, the principal, to satisfy its demand, and subsequently, without the consent and against the protest of the surety, having released the attachment and dismissed the suit, thereby released appellant, the surety, from all liability on the notes sued on.

The questions raised by the contention of the appellant were fully discussed in *Rawson v. Taylor*, 30 Ohio St. 389, 27 Am. Rep. 464, and the conclusion reached that "a retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto." In *Fensler v. Prather*,



43 Ind. 119, a case involving the question under discussion, it was said: "Two partners, owing debts and having assets, dissolve partnership; and, by agreement, one partner was to retain all the assets, and pay all the debts, and manage and <sup>204</sup> close up the business. The partner who had withdrawn from the management of the business, desiring a discharge from further personal liability on a certain note made by said firm, and held by one of the creditors thereof, acquainted such creditor with the facts of the partnership arrangement, and proposed to pay him one-half the amount of said note, the creditor to relieve him from further liability, and look to the effects in the hands of the former partner and to such partner personally for the other half, which proposition the creditor accepted, and one-half the amount of said note was then paid accordingly. Held, that such part payment was not a sufficient consideration for the promise to release the party making it as to the remainder." In *Shriver v. Lovejoy*, 32 Cal. 575, a case almost exactly like the one at bar, the court said: "The plaintiff sued Lovejoy (the surviving partner of Lovejoy & Co.) and Grandvoinet upon a joint and several promissory note made by Lovejoy & Co. Grandvoinet relied for a defense mainly on the fact that Lovejoy & Co. were the principal debtors; that he was only their surety; and that the plaintiff, after having commenced this action and attached sufficient property of Lovejoy to satisfy the demand, released the property from the attachment, and the same was attached by other creditors of Lovejoy. The court gave judgment for the plaintiff. All the makers of a joint and several promissory note, whatever may be their true relation between themselves, stand, as to the payee, as principals. The promise of each is an absolute and primary promise, not a conditional or secondary promise. The creditor is not interested in knowing the relation of the makers with each other. In a suit on the note, he ought not to be delayed by an investigation into matters which do not concern him." And it was held that the facts alleged constituted no defense: *Johnson v. Emerick*, 70 Mich. 215. This court in *Smith v. Freyler*, 4 Mont. 489, 47 Am. Rep. 358, fully discusses the questions here presented, and collates the authorities. In that case we said: "When a surety signs a promissory note, his promise is absolute and unconditional to pay the same when it becomes due; <sup>205</sup> and there is no escape from this promise unless the payee or holder releases him. He does not promise that he will pay if the payee or holder fails to collect the note by

an action against the principal. The payee or holder does not receive the note with an implied promise that he will exhaust his remedy against the principal before proceeding against the surety. The obligation of the surety is to pay according to the terms of his promise, and he may protect himself by paying, and then proceeding against the principal, and that is his remedy. . . . The authorities are decidedly in favor of the proposition, in absence of any statutory provision controlling it, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterward becomes insolvent, the surety is not thereby discharged. And if there were no authorities on the subject, considering the nature of the obligation of a surety, we do not well see how the contrary could be maintained. The contract of the surety to pay is as absolute as that of the principal, and he cannot change his absolute promise into a conditional one to pay, providing the creditor cannot collect from the principal. The averment in the answer that the plaintiff theretofore agreed to, and did, release the defendant from all liability on the note, is the averment of a legal conclusion; and the further averment that the plaintiff then and there told the defendant to rest easy, that he would not look to him for the payment of the note, but that the principal was good enough for him, and that he would trust him for the payment thereof, is a promise without a consideration, and would not have prevented the plaintiff, the payee, from at once commencing action against the surety to collect the note." We are aware that there are some authorities which hold with appellant's contention; but recent authorities draw a marked distinction "between cases where the relation of principal and surety existed inter se at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals inter se at the date of the obligation, and a subsequent agreement between the joint 206 debtors by which, as between themselves, one becomes a surety for the other, of which subsequent arrangement the creditor had knowledge": *Rawson v. Taylor*, 30 Ohio St. 389; 27 Am. Rep. 464; *Swire v. Redman*, L. R. Q. B. Div. 536.

We are firmly of the opinion that one obligor cannot change his relation to his creditor by any agreement with his joint obligor without the creditor's consent. In view of the foregoing authorities, we are of the opinion that the answer of appellant did not state facts sufficient to constitute a defense, and

that there was no error in the action of the court in sustaining the demurrer thereto.

The judgment appealed from is affirmed.

Hunt and Buck, JJ., concur.

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**PARTNERSHIP—LIABILITY OF RETIRING PARTNER.**—An agreement between partners that one of them shall retire from the firm, and that those remaining will assume and discharge the firm liabilities, unless consented to by its creditors, does not release the retiring partner from liability, nor change his liability into that of a surety: *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110; 59 Am. St. Rep. 783, and note.

**DEBTOR AND CREDITOR—AGREEMENT OF DEBTORS CHANGING THEIR CHARACTER.**—Creditors cannot be forced to submit to a change of debtors: *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615, and note. One of two or more principal debtors cannot, by agreement among themselves, without the consent of their creditor be changed in character from a principal to a surety so that he will be released by those acts or omissions which release a surety: *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110; 59 Am. St. Rep. 783, and note.

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## McCARTHY v. O'MARR.

[19 MONTANA, 215.]

**EXECUTIONS—SALES—OFFICERS' RIGHT TO RETURN PROPERTY SOLD TO ITS OWNER.**—An officer, who, under an execution against a certain named person, sells property found in his possession and held under an attachment against him, but belonging to a third person, and who, upon discovering such fact after the sale, returns the money to the purchaser and the property to its real owner, and makes his return upon the execution in accordance with the facts, is not liable to the judgment creditor for the amount thus realized at the sale.

**EXECUTIONS—SALES—ESTOPPEL AGAINST OFFICER.** A sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold was not the defendant's, nor liable to such levy and sale.

Assumpsit by a judgment creditor to recover money realized by a sheriff at a sale made by him under execution. Judgment for plaintiff, and defendant appealed.

Smith & Gormley, for the appellant.

F. Maddox, for the respondent.

**218 HUNT, J.** It is clear, by Judge Armstrong's memorandum attached to defendant's request for findings, that the proof on the trial of the case was to the effect that the plaintiff in the suit of *McCarthy v. Lyons* directed the defendant herein, as



sheriff, to levy upon the piano as the property of Emma Lyons, and that the sheriff did so, and sold the same, without any knowledge of the admitted fact that Emma Lyons had no interest whatever in the property so levied upon and sold. It was also proved that after the sale, and before his return of the execution, the sheriff first found out that Emma Lyons was not the owner of the piano, and that thereupon he delivered the same to the Capital City Music Company, the real owner, and returned the money he had collected on the sale to <sup>219</sup> the purchaser thereat. Upon these proofs, we do not understand that the learned judges who presided in turn during the various stages of the trial of the case disagree. The record and its recitals, by Judge Armstrong, that the proofs were as defendant requested the court to find, justify this statement. But we do understand that they are much at variance with one another, both as to legal competency of such proofs, and as to the legal effect to be given them if competent. It appears to us that the wrong complained of by plaintiff (respondent) is the failure of the sheriff to turn over to plaintiff a sufficient amount of money realized from the sale of the piano to satisfy the execution issued in the case of McCarthy v. Lyons; and we are satisfied that, under the answer of defendant, he could prove that the piano was not the property of Emma Lyons when attached, nor ever after, and that such proof would be competent evidence that defendant is in no default, but would have been guilty of conversion had he complied with plaintiff's wishes and paid him the money. We therefore think the evidence of defendant upon this branch of the case was properly admitted on the trial, but improperly disregarded in the findings adopted. It is well established that an officer is under no duty—indeed, he has no right—to execute a process delivered to him for service by seizure of the property of a person against whom the process does not run: *Gallup v. Robinson*, 11 Gray, 20. Furthermore, if a sheriff fails or omits to levy an execution upon goods which did not at the time of the attachment, or afterward, belong to the debtor, though they had been attached as the property of the debtor, he will not be guilty of any negligence or misconduct at law, and the creditor has no cause of action therefor. And in such an instance it is a good defense, where the officer is sued, to prove paramount title in another: *Canada v. Southwick*, 16 Pick. 556; *Governor v. Gibson*, 14 Ala. 326. This doctrine is reasonable, for, if the judgment debtor in truth has no personal property within the county of the sheriff,

why should that officer, assuming he has acted in good faith, be required to pay the judgment of the attaching creditor? *Lumis v. Kasson*, 220 43 Barb. 373. The statute (Comp. Stats. 1887, div. 1, sec. 320), as if to protect a sheriff against liability in trespass for levying upon the personal property of a third party, if such a party claims the property seized, makes it obligatory upon that official to deliver the property levied upon to the claimant, after notice, unless the plaintiff gives him a good bond to indemnify him against loss or damage by reason of holding such property. And if he must turn over property levied upon, when claimed on oath by a third person, unless indemnified, on what principle should he be compelled to apply the proceeds of the sale of the property of a third person toward payment of the debt of the creditor, where he, in all good faith, has only ascertained after such sale that the property has always belonged to a third person, and never did to the judgment debtor? The learned judge who made the findings and conclusions of law in the case upon which judgment was predicated doubtless recognized these principles above stated, but believed that they were inapplicable to the facts, because the sheriff, having made a return of a levy and sale of the piano as the property of Emma Lyons, was estopped from afterward saying that it was not her property, and hence his payment of the proceeds to the purchaser, and his return of the piano to the Capital City Music Company, were unauthorized by law, and did not release him from his obligation to pay the amount of the plaintiff's judgment to him. The judge was also of the opinion that the sheriff had no authority "to amend his return as attempted by him to be done, as it would have been amending such return so as to state the facts different from what they really were; and, as a legal proposition, an officer can only amend his return so as to make the return correctly set forth what was actually done, and not to change the attitude or status of the parties." But, if we concede that the officer could not make the amended return he did, because it contradicted the fact of a levy and sale—a proposition which we need only concede for the purposes of this opinion—we nevertheless believe that his defense of paramount title was admissible notwithstanding the first return 221 he made. By it the sheriff recited the actual facts of his levy and sale, and of his subsequent return of the money to the purchaser because the piano did not belong to the defendant named in the execution. There is nothing inconsistent with this re-

turn and the fact proved, that the knowledge that Emma Lyons did not own the piano only came to him after the execution sale. So that his attitude upon the trial and as disclosed by his return are not in conflict with one another; and the return, so far as it goes, conforms to the proof. The case is thus brought within the rule laid down in *Hopkins v. Chandler*, 17 N. J. L. 299, that a sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold under the plaintiff's execution was not the defendant's, nor liable to such levy and sale. We quote the following pertinent language from the opinion of Chief Justice Hornblower in that case: "It comes then to this question: Can a sheriff, after levying upon property and selling it under an execution, withhold the money from the plaintiff, and successfully resist an amercement for not paying it over, upon the ground that the property levied upon and sold by him belonged to other persons than the defendant, and were not liable to the plaintiff's execution? An amercement comes in the place of an action at law for money had and received, and if, in such an action, the facts stated in the case were clearly proved or admitted, we should have no difficulty, perhaps, in saying the plaintiffs ought not to recover. It would seem to be unreasonable, if a sheriff by mistake should sell property not liable to a plaintiff's execution, that he should be compelled to pay the money to the plaintiff, and be left to respond to the owner of the property. And, upon this view of the subject, there would seem to be no good reason why, in a plain case, such as this strikes me to be, we should not, upon a motion for amercement, make a similar decision. . . . The first question, then, is whether the sheriff is estopped by his levy and sale from denying the plaintiff's right to this money; I think not. In an action against him, he would be at liberty to <sup>222</sup> show that the property was subject to prior liens which had exhausted the proceeds; and I can see no reason why he might not be permitted to show that he levied and sold by mistake, under the plaintiff's execution, property that was not liable to such seizure and sale": See, also, *Harris v. Kirkpatrick*, 35 N. J. L. 392; *Crocker on Sheriffs*, sec. 853; *Commonwealth v. Booker*, 6 Dana, 443; *Freeman on Executions*, sec. 304. It may be that a sheriff cannot, by averments of his pleading, impugn the verity of his official return; yet he is often allowed to prove other facts consistent with it, but tending to exonerate him from a liability apparently



created by it: *Murfree on Sheriffs*, sec. 868. But, as explained, this is not a case where a sheriff seeks to falsify his return on an execution by evidence, but rather one where he has made a special return of facts, and by his evidence fully explains those facts; and this, as against the judgment creditor suing, we think he may do, either in action for money had and received, or for a false return: *Lummis v. Kasson*, 43 Barb. 373; *Fuller v. Holden*, 4 Mass. 498; *Canada v. Southwick*, 16 Pick. 556; *Shotwell v. Hamblin*, 23 Miss. 157; 55 Am. Dec. 83; *Union Bank v. Benham*, 23 Ala. 143; *Evans v. Davis*, 3 B. Mon. 344; *Baker v. McDuffie*, 23 Wend. 289; *Alderson on Judicial Writs*, 578; *Freeman on Executions*, sec. 366; *Decker v. Armstrong*, 87 Mo. 316.

In conclusion, we find appellant's defense is well supported by reason and authority. The judgment is therefore reversed, and the cause remanded, with direction to enter a judgment for the defendant.

Pemberton, C. J., and Buck, J., concur.

**EXECUTION—SALES—DUTY OF OFFICER—RIGHTS OF PURCHASERS.**—The sheriff must at his peril avoid seizing under execution any other property than that of the defendant. It is not enough that he should presume, even on strong grounds, that the property is the defendant's; he must know it: *Duperron v. Van Wickle*, 4 Rob. (La.) 39; 39 Am. Dec. 509, and note. See *Dunlap v. Berry*, 4 Scam. 327; 39 Am. Dec. 413. The purchaser at a sheriff's sale of real property under execution gets only such interest as the judgment debtor possessed. If the judgment debtor has nothing the purchaser gets nothing and the sale is a nullity: *Zabriskie v. Meade*, 2 Nev. 285; 90 Am. Dec. 542, and note; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388, and note. A purchaser at an execution sale whose purchase is set aside is entitled to be reimbursed the amount that he has paid and has a lien upon the land for such amount: *Bunts v. Cole*, 7 Blackf. 265; 41 Am. Dec. 226. Where the sale is of personal property and the officer is aware that the execution debtor has no title thereto, the purchaser may recover the money paid while lying in the hands of the officer in an action for money had and received: *Bartholomew v. Warner*, 32 Conn. 98; 85 Am. Dec. 251. See, also, *Henderson v. Overton*, 2 Yerg. 394; 24 Am. Dec. 492; *Hackley v. Swigert*, 5 B. Mon. 86; 41 Am. Dec. 256.

**THE DILIGENCE AND CELERITY REQUIRED OF SHERIFFS IN SERVING EXECUTIONS** and other process, and their liability for loss resulting from want of such diligence is discussed in the monographic note to *People v. Palmer*, 95 Am. Dec. 423-441.

## AMERICAN SAVINGS AND LOAN ASSOCIATION v. BURGHARDT.

[19 MONTANA, 323.]

**HOMESTEAD—MORTGAGE OF—ACKNOWLEDGMENT BY WIFE.**—Under a statute making a mortgage of a homestead void unless the wife joins in the execution thereof, the acknowledgment by the wife is an essential part of the execution of the mortgage, and, if substantially defective, the mortgage is void.

**HOMESTEADS—MORTGAGES OF.—ABANDONMENT** of a homestead does not retroact so as to give validity to a mortgage thereof void at the time of its execution.

**MORTGAGES—FORECLOSURE—PLEADING.**—A complaint to recover on a note, and to foreclose a mortgage given to secure it, does not state two separate causes of action; and plaintiff may be entitled to recover judgment on the note, although the mortgage is void.

Action to recover on a note and to foreclose a mortgage given to secure its payment. Judgment for defendants, and plaintiff appealed.

F. C. Parks, for the appellant.

Stanton & Stanton, for the respondent.

**325** PEMBERTON, C. J. The first material question presented by this appeal is as to the validity of the mortgage. It is not disputed that the land in controversy was the homestead of the defendants at the date of the execution of the mortgage. This mortgage was executed and this suit brought under the Compiled <sup>326</sup> Statutes of 1887. Section 323, division 1, of said statutes provides that a "mortgage or other alienation of such homestead by the owner thereof, if a married man, shall be void, unless the wife join in the execution of the conveyance thereof." The appellant admits that the acknowledgment is not such as is required by law in such cases, but contends that the signature alone of the wife, without any technical acknowledgment, was sufficient to authorize the husband to encumber the homestead with the mortgage. The appellant contends that the acknowledgment by the wife of the mortgagor constitutes no part of the execution thereof. Counsel for appellant relies principally upon the decisions of Wisconsin and other states whose laws on this subject are different from ours. The laws of Wisconsin seem to require only the signature of the wife to the conveyance or mortgage of the homestead. The decisions of courts in other states cited by appellant seem to have been rendered under similar laws to those of Wisconsin. In Montana Nat. Bank v.

Schmidt, 6 Mont. 610, this court said: "The homestead can be conveyed only when the wife executes the conveyance by signing and acknowledging that she executes the same freely and voluntarily. The acknowledgment thus becomes an essential part of the execution of a deed by a married woman." To the same effect we cite *McLeran v. Benton*, 43 Cal. 467; *Leonis v. Lazzarovich*, 55 Cal. 55. See, also, authorities cited in note to *Livingston v. Kettelle*, 41 Am. Dec. 170. We think, under the authorities cited, the acknowledgment of the wife under our law of a mortgage of a homestead is an essential part of the execution thereof, and that, if such acknowledgment is substantially defective, the mortgage is, for that reason, void. This is certainly in accordance with the rule announced in *Montana Nat. Bank v. Schmidt*, 6 Mont. 610. The acknowledgement of the wife in the case at bar is defective in almost every requirement of the statute. We are, therefore, of the opinion that the mortgage sued on in this case is void.

The appellant contends that the defendants abandoned the homestead in question before the bringing of this suit, and for <sup>327</sup> that reason cannot plead such privilege and exemption to defeat a recovery in this case. Even if it be conceded that the defendants abandoned the homestead premises after the execution of the mortgage thereon, and before suit to foreclose, yet such abandonment did not retroact so as to give validity to the mortgage, which was void from the time of its execution. The mortgage, being void ab initio, could not be validated by abandonment: *Waples on Homesteads*, 559. In *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, it is held that a subsequent declaration of abandonment by husband and wife gives no validity to a void mortgage of the homestead. We think the appellant can claim nothing by the abandonment of the defendants after the execution of the mortgage of the homestead, even if the abandonment be conceded.

The appellant contends that it was entitled to a personal judgment against the defendant Harry D. Burghardt for the amount of the note in any event, and assigns the action of the court in dismissing its complaint and rendering judgment in favor of defendants for costs as error. One provision of the note sued on is as follows: "It is understood that this note is given for a loan obtained on thirty (30) shares of stock of said American Building and Loan Association, and if the maker fails to make any monthly payment on said stock, or to pay any install-



ment of interest for a period of six months after the same is due, then the whole amount of this note shall at once become due and payable." The evidence is uncontradicted that the defendant Harry D. Burghardt failed for many months prior to suit to pay the monthly installments called for by the terms of the note. There is no pretense that he was not in default in this respect. By reason of such default, the whole note became due and payable according to the terms thereof. Counsel for the respondents defends the action of the court in this respect; because, he says, there were two causes of action joined in the complaint, to wit, an action at law on the note, and a suit in equity to foreclose the mortgage; and that, the mortgage having been held to be void, the plaintiff was not entitled to judgment at law on this note. We <sup>328</sup> think this contention entirely erroneous. In Bliss on Code Pleading this question is fully discussed, and authorities cited: See Bliss on Code Pleading, secs. 159-171. And in section 171, speaking of suits on promissory notes secured by mortgage, the author says: "But the objections to this view are twofold: 1. A party usually asks the aid of a court in the exercise of its equitable jurisdiction when, without it, he has no claim for the money or for the specific property which he seeks. The legal demand, so called, does not arise until after the decree of the chancellor. When the mistake in his contract is corrected, when the deed that interferes with his title is set aside, when the constructive trust is declared, then his power to enforce his money or property demand begins. In such case there is but one cause of action, and there can be no separate statement. 2. If the money demand be perfect at first, this objection does not lie; but even then, as in collecting a debt secured by a lien, there is but one cause of action, but one wrong, although two actions may be based upon it. The money demand may be separately prosecuted, and the wrong—the cause of action—is the refusal to pay it; if he seeks to enforce the lien, the plaintiff has the same cause of action, only another remedy, and he will obtain other relief. Formerly, this twofold relief was sought in different courts, and by a different mode of procedure—one was called an action at law, and the other a suit in equity; and only by the rule given in section 166 could one have full relief by one action. Under the code there is but one court and one form of action, and, by a single complaint, the aggrieved party may have all the relief to which he is entitled. In seeking what is still called legal and equitable relief, he does

not unite different causes of action, for there is but one; he only seeks the twofold relief for the one wrong; therefore there can be no union of causes of action by separate statements. The pleader, in thus seeking full relief, should embody in his one statement all the facts showing the obligation and its breach, to which should be added the facts which show the lien, and he will ask for the double relief; or, if he seeks a money judgment only, <sup>329</sup> he will stop with the obligation and breach." We think there is but one cause of action stated in the complaint. Under our practice there is but one court, with common-law and equity powers, one form of action, and, if there were several causes of action arising on contract stated in the complaint, it would not be bad on that account, but plaintiff in such case could recover, and ought to be permitted to recover, whatever relief it shows by its evidence it was entitled to under any allegation of the complaint. Our statute and practice are not dissimilar from those discussed by Mr. Bliss: See, also, *Moors v. Sanford*, 2 Kan. App. 243.

For this error the cause is remanded, with directions to the district court to set aside the order and judgment appealed from, and to render judgment for the plaintiff against defendant Harry D. Burghardt for the amount of the note sued on.

Hunt and Buck, JJ., concur.

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**HOMESTEAD—MORTGAGE OF—ESSENTIALS—JOINING OF HUSBAND AND WIFE.**—A mortgage—not for purchase money—of his homestead by a married man without his wife's signature is absolutely void: *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681, and monographic note. Although a mortgage upon a homestead is signed and acknowledged by both husband and wife, the failure of the husband to join in the granting part thereof renders it void: *Seiffert etc. Lumber Co. v. Hartwell*, 94 Iowa, 576; 58 Am. St. Rep. 413, and note. The wife's certificate of acknowledgment to such mortgage may be impeached for fraud, duress, or undue influence: *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537. See *O'Malley v. Ruddy*, 79 Wis. 147; 24 Am. St. Rep. 702, and note.

**HOMESTEAD—MORTGAGE BY HUSBAND ALONE—EFFECT OF SUBSEQUENT ABANDONMENT.**—The rule established in many of the states is, as held in the principal case, that the mortgage of a homestead given by a married man without his wife's signature is void absolutely, and not merely as to the homestead interest; nor is it validated by the subsequent abandonment of the homestead: Monographic note to *Alt v. Banholzer*, 12 Am. St. Rep. 684. See, however, *Stewart v. Mackey*, 16 Tex. 56; 67 Am. Dec. 609. Also, *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681.

## CASEY v. THIEVIEGE.

[19 MONTANA, 311.]

**MINES AND MINING—"KNOWN VEINS,"**—To meet the designation "known" veins or lodes mentioned in section 2333 of the Revised Statutes of the United States, veins or lodes within the boundaries of a placer claim at the time of the application for a patent therefor, which should be excepted from a patent issued thereon, must, at the time of such application, have been clearly ascertained and must have been of such an extent, character, and value as to justify their exploitation.

**MINES AND MINING—KNOWN VEINS—BURDEN OF PROOF.**—One claiming a quartz lode mining claim within the boundaries of a patented placer claim has the burden of proof to show that the vein upon which his claim is founded was "known" at the time when application was made for the placer patent.

**MINES AND MINING—KNOWN VEINS—INSUFFICIENT PROOF OF.**—Evidence of finding prior to application for a placer patent for a mining claim, streaks of quartz, croppings indicating the existence of leads and veins between granite walls upon the ground, which in the opinion of witnesses carry silver, together with proof of the location of a mining claim on one of these veins within the placer claim, and the abandonment thereof because of the expense of working it, without an assay to ascertain its value, does not justify a verdict that such veins were "known veins or lodes" within the meaning of section 2333 of the Revised Statutes of the United States, and a judgment based on such verdict must be reversed.

Ejectment to recover certain land. Casey and other plaintiffs claimed the land as a placer mining claim, while Thieviege and other defendants claimed it under a quartz lode location. Plaintiffs claimed as the grantees of one Black, who located and obtained patent for what is known as the "Black Placer," referred to in the opinion. Judgment for defendants, and plaintiffs appealed.

F. T. McBride, for the appellants.

T. Campbell, J. T. Baldwin, and W. I. Lippincott, for the respondents.

**345 BUCK, J.** This case is the result of a conflict between a placer patent and a quartz lode location made subsequent to the application for the placer patent. In investigating the questions involved, we accord full force and effect to the general rule that, where there is a conflict in evidence on the trial, the verdict should not be disturbed on appeal. The verdict in this case, then, must be sustained, if there is competent evidence to support it. We must accept as proven the fact that, at the time the application was made for a patent to the Black placer claim, its surface indicated veins of mineral bearing rock in place. It is true



that witnesses on behalf of respondents testified positively that such veins or lodes were in the claim, and plainly visible as veins or lodes at the time of such <sup>346</sup> application. But, inasmuch as these witnesses gave in detail the facts on which they based this assertion, these facts, and not the mere assertion based thereon, however positively made, should be considered. The assertion was in the nature of a legal conclusion, being only the expression of an opinion. Hence in what we deem proven by respondents we do not go to any greater extent than to concede that they showed in evidence that the surface appearance of the Black placer, at the date of the application for patent, indicated by croppings and in exposed bedrock the existence of lodes or veins of mineral bearing rock in place.

From the questions submitted to the jury and the argument of their counsel in this court, it would seem that respondents contend for this proposition of law, namely, that when an application for a placer patent is made, any lode or vein of quartz or other rock in place containing any gold, silver, lead, tin, or copper whatsoever, known to exist within the boundaries of the claim (or the knowledge of whose existence could be ascertained by one examining the ground in an honest endeavor to acquire such knowledge), is excepted by section 2333 of the Revised Statutes of the United States, from a patent issued on such application. If this is the law, the determination of this appeal might be attended with more difficulty than it is; for it also appears from the evidence herein—admitted without objection—that some years after the application for a patent for the Black placer claim, in the discovery shaft of the Blue Dick quartz lode claim, sunk on one of the three so-called “traceable veins” crossing the Black placer at the time of application for its patent, a vein of ore was found carrying as much as twenty-nine ounces of silver to the ton, as shown by one of the two assays made. But we cannot agree with the proposition that this is the law. It virtually eliminates from the question of what is the vein or lode known to exist, the elements of value, character, and extent of the existing vein or lode. In *Migeon v. Railway Co.*, 23 Co. Ct. App. 163, 77 Fed. Rep. 256, Judge Hawley, speaking for the United States circuit court of appeals, says: “This section [2333] of the statute <sup>347</sup> was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then,

by paying five dollars an acre for that portion of the ground and two dollars and fifty cents for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right to possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove; if it is not known to exist at the time of the application, the patent for the placer claim will include such lode or vein. In such cases, the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals, to justify their designation as 'known veins or lodes', that in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation: *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 383; *United States v. Iron Silver Min. Co.*, 128 U. S. 674, 683; *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394, 404, 424, 553; *Sullivan v. Mining Co.*, 143 U. S. 431; *Brownfield v. Bier*, 15 Mont. 403, and other authorities there cited.

"This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from." In the case of *Iron Silver Min. Co. v. Mike etc.* <sup>348</sup> *Min. Co.*, 143 U. S. 394, cited supra, the court says: "It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute." And further the court says: "The amount of the ore, the facility of working and reaching it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working." In *Brownfield v. Bier*, 15 Mont. 403, *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394, is elaborately discussed.

Our supreme court there says: "But in that case the contention within the court seems to us to have been more upon the question of facts in that particular case than upon a view of the law"; and proceeds to quote, as declaratory of the law, language taken from the majority opinion of the court, and also from the dissenting opinion rendered therein by Mr. Justice Field and Associate Justices Harlan and Brown. Certain portions of this language are requoted below.

But the respondents urge, to meet this view entertained by the Montana supreme court of what was held in *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394, that the question of value is one solely for the jury, and the facts in this case are stronger in favor of the verdict than those successfully invoked for the same purpose in *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394. This language is relied upon from the last-named decision to uphold the first contention: "It is, after all, a question of fact for the jury. It cannot be said, as a matter of law, in advance, how much of gold or silver must be found in a vein before it will justify exploitation, and be properly called a 'known' vein."

As to what were the particular facts involved in *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394, the justices of the supreme court of the United States were divided in opinion, and this fact led the supreme court of Montana to use the language <sup>349</sup> it did in *Brownfield v. Bier*, 15 Mont. 403. The majority of the justices claimed the record showed that, prior to the application for a patent to the placer claim of the Iron Silver Company, within the limits of said placer a tunnel had been run to the extent of four hundred feet; that in said tunnel, about seventy-five or eighty feet from its mouth, a fifteen inch vein of quartz, with distinct walls of porphyry, had been disclosed; and that assays of the ore taken from this vein had been made (apparently at the time it was found), showing that the same was valuable gold producing ore. Speaking of the facts involved, Mr. Justice Brewer, in delivering the opinion for the majority of the court, said: "The placer tract was a small one of fifty-six acres. The tunnel ran four hundred feet underneath its surface. At its mouth there was a large dump of earth taken from it. No one had a right to enter that ground as placer mining ground, unless he had made such an inspection as to enable him to make affidavit that it was adapted to such mining. No examination could have been made without disclosing the



existence of this tunnel. That was a fact upon the surface, obvious to the most casual inspection. No one could be heard to say that he had examined that ground in order to ascertain that it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel. It was not a little excavation, with a few shovelfuls of dirt at its entrance. The pile of dirt was evidence which no one could ignore that it was a long tunnel, running far into the earth. It was in mining ground, as all this territory was believed to be, and, therefore, an excavation likely to disclose veins.

“As an applicant for a placer patent was chargeable with notice of the existence of the tunnel, so also was he chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say: ‘I did not enter and examine this tunnel, and therefore knew nothing of the veins apparent in it.’ The government does not permit a person to thus shut his eyes and buy. If there be a vein or lode within the ground, it is entitled to double price per acre for it and the adjacent fifty feet; and, with such interest in the price <sup>350</sup> to be paid, it rightfully holds an applicant for a placer patent chargeable with all that would be disclosed by a casual inspection of the surface of the ground, or of such a tunnel. The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government.” But Mr. Justice Field, in the dissenting opinion, says: “It [the tunnel] extended four hundred feet, but it disclosed within it only veins of decomposed porphyry and manganese iron. . . . There was no vein or lode of gold or silver bearing rock found in the tunnel, and there is an erroneous impression conveyed by the court (in the majority opinion) in that respect.” Proceeding, Justice Field says: “But, as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. It would create surprise among miners to be told that if a trace of loose gold, such as is shown here, was found at any one spot in a tunnel leading to a placer claim, it would establish the existence of a vein or lode in the placer claim, and form the basis of a proceeding to despoil a purchaser from the patentee, years after the purchase, of a large portion of its mining property. . . . An unlocated lode

claim, existing only in the impressions and beliefs of neighbors or others, and not in the knowledge founded upon discovery and exploration, does not seem to me to have any element of property or validity, or a basis of defense to proceedings to obtain a patent from the government." As we have said, there were indications of veins in the Black placer at the time of the application for its patent. It is true that what appeared to be veins had been exposed between walls of granite in the bedrock. But not a particle of competent or sufficient evidence was offered by respondents (on whom rested the burden of proof) to establish the fact that these veins had been clearly ascertained, or contained minerals sufficient as to value, quantity, or character to justify exploitation. Even by respondents' <sup>351</sup> own witnesses these quartz filled crevices in the granite bedrock of the Black placer (that witnesses designated them positively as veins or lodes, as we have shown, was not sufficient evidence of the fact that they were) had never been explored, or even examined with a view to prospecting or working them during the placer mining period. They were encountered just as strata seams and quartz filled crevices were usually encountered at the surface and on bedrock in working other placer mines in that vicinity. No serious attempt had been made to prospect or exploit them. A witness who sunk on some of them says "they played out." Another witness dissuaded his partner from locating one of them, which he designates as the "main vein," by suggesting that they had already a hundred locations too many. His partner, this witness says, regarded this vein at the time as a "favorable prospect." Hirbour, the locator of the Leo quartz lode, may possibly have sunk a shaft for a few feet on one of these so-called "traceable veins," but he found practically nothing. He says he took out a few pounds of ore. Largey struck what he calls a "blind lead" in his quartz lode claim, the Montana Central, which was located after the application for the placer patent. He says that at the point where he made his discovery of a blind lead the croppings (which extended from said point into the Black placer ground) were detached from the vein he found, and were only float. He states also that he sunk shafts within the Black placer on these so-called veins or leads, but did not even find as a result any vein with well-defined walls. Largey may have been an interested witness, but the respondents put him upon the stand as their own witness, and we cannot find any testimony in the record which substantially contradicts his

statements. The fact, of itself, that Largey and the owners of the Black placer were to exchange interests in their grounds by way of compromise, is not competent evidence to establish the value of the Montana Central quartz lode vein for exploitation at the date of the application for the placer patent. At the time of the application for patent, so far as the testimony for respondents shows, the extent and <sup>352</sup> definite character of the quartz in these crevices in the Black placer were unknown. No assays had been made of the quartz found on bedrock or elsewhere. The ground itself had been worked as a placer mine for years, and, according to all the witnesses who testified on the subject of the value of the quartz therein, was considered valuable for placer mining only. That quartz ore of value was found in the Blue Dick discovery shaft cannot avail respondents. The location of the Blue Dick was made some eight years after the application for the Black placer patent. However, no great amount of work (so far as the record discloses) had ever been performed in exploiting the Blue Dick vein. There was little evidence to show the value or extent of this vein. At the time of the trial of this suit in the lower court its discovery shaft was half full of water. Two of its locators had dwellings and out-houses on the ground before they made the location, and they were conducting a wood business on the premises at the time of the location. One of them had entered into possession of the premises in dispute under a deed from one Upton, who apparently had some kind of a possessory right to the ground. In 1888, one of the respondent defendants received two deeds from these locators, one of which conveyed to him a certain part of the property in dispute (described with reference to the surface area), on which there was a dwelling-house, and the other an interest in the Blue Dick. This evidence was insufficient to present a question of fact for the jury under the law applicable.

We reiterate the rule as laid down, after a careful review of the authorities, in *Brownfield v. Bier*, 15 Mont. 403, that to meet the designation "known" veins or lodes mentioned in section 2333 of the Revised Statutes of the United States, veins or lodes within the boundaries of a placer claim at the time of the application for a patent therefor, which should be excepted from a patent issued thereon, must, at the time of the said application, have been clearly ascertained, and must have been of such an extent, character, and value as to justify their exploitation. Conceding everything as proven which can in any possible view



of the evidence be regarded as <sup>353</sup> advantageous to respondents, we are still of opinion that they clearly failed to make out their case. It follows that the special findings of the jury did not justify the general verdict and judgment. There was hardly any temptation to Black, when he applied for a patent, to perpetrate a fraud on the government. By paying ten dollars more for the four acre placer, he could have had any quartz leads thereon specifically conveyed to him. Mr. Justice Field, stating the law as to presumptions in favor of government patents, says, in his dissenting opinion in *Iron Silver Min. Co. v. Mike etc. Min. Co.*, 143 U. S. 394: "The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances existed: *Smelting Co. v. Kemp*, 104 U. S. 636, 646. As was said by the circuit court in *Eureka etc. Min. Co's case*, 4 Saw. 302, Fed. Cas. No. 4548, a patent for a mining claim is ironclad in its potency against all mere speculative inferences." The tendency of the later decisions of the federal courts is to uphold the presumptions in favor of placer and townsite patents more carefully than appears to have been done in some of the earlier decisions of those courts in conflicts between such patents and subsequently located quartz lodes. This is particularly noticeable in the late case of *Dower v. Richards*, 151 U. S. 658. Perhaps one reason for this is the fact that it has not infrequently happened, in cases involving such conflicts, where the ground in dispute lies within an inhabited portion of a town or city, that the courts have been appealed to and compelled to determine them under the rules of law governing mineral locations, while underlying the apparent issue the real source of controversy was the desire to acquire title to land only nominally valuable for mining purposes. Whether this is true or not, however, in all such cases <sup>354</sup> where persons locate a quartz lode within a placer claim which lies in a town or city, or in a townsite, subsequent to the application for a patent to the one or the other, the evidence as to the existing known lead justifying a decision in favor of the quartz lode claimants should be clear and convincing, and not made up of surmise or mere personal impressions and beliefs. Were this not true, honestly

acquired town lot titles in populous mining towns and cities, based on such patents, would be constantly in jeopardy, and subject to possible attack at any time when, in the digging of a cellar or the foundation for a house, a vein of quartz should be disclosed. The upsetting of vested rights to such realty, years after the patents under which they have been acquired were applied for, should never be encouraged or tolerated when based on frivolous or insufficient grounds. In the enactment of the mineral laws, Congress never contemplated any such result.

Respondents pleaded the statute of limitations as against plaintiffs, but, inasmuch as they have themselves abandoned this phase of the case, we need not discuss it. Numerous other errors are assigned, particularly in reference to the instructions given by the lower court. But these also it is unnecessary to pass upon. The judgment is reversed, and the cause remanded, with directions to the district court to grant a new trial.

Hunt, J., concurs.

Pemberton, C. J., not sitting.

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**MINES AND MINING—KNOWN VEINS.**—A lode or vein exempted from a placer grant within the meaning of section 2333 of the Revised Statutes of the United States, if it was known to exist at the time of the application for a placer patent, must at least be of such extent and value as to justify exploration, in expectation of finding ore sufficiently valuable to work. To meet the designation of "known" veins or lodes they must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation: *Brownfield v. Bier*, 15 Mont. 403. See *Lindley on Mines*, sec. 209. It seems that the requisites of a "known" vein under the section of United States Revised Statutes above cited are different from those of a vein or lode which will justify a location under section 2320. Under the former, the ledge must be known to be so valuable for its minerals as to justify expenditures for their extraction, while under the latter comparatively slight indications of a defined and mineral bearing ledge have been held sufficient: *Montana Cent. Ry. Co. v. Migeon*, 68 Fed. Rep. 811. See, also, *Butte etc. Min. Co. v. Sloan*, 16 Mont. 97.

## YELLOWSTONE NATIONAL BANK v. GAGNON.

[19 MONTANA, 402.]

**NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—RIGHTS OF PLEDGEE.**—An indorsee of negotiable paper who takes it before maturity as collateral security for a pre-existing debt is to the extent of such debt, and to that extent only, a purchaser in good faith, unaffected by equities between the original parties of which he had no notice.

**NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITIES—EXTENT OF LIEN OF PLEDGEE.**—A holder of negotiable paper taken before maturity as collateral security for a pre-existing debt less in amount than the collateral is protected against equities between the original parties only to the extent of his debt.

Action to recover the face value of a note for two thousand three hundred and ninety-two dollars and seventy-five cents taken before maturity and without notice of equities as collateral security for a pre-existing debt of the payee and indorser to the holder and indorsee, amounting to twelve hundred dollars. The defendant resisted the right of the plaintiff to recover on the note to a larger amount than the debt it was given as collateral to secure. Judgment for plaintiff for the full amount of the note, and defendant appealed.

O. F. Goddard, for the appellant.

G. S. Lane, for the respondent.

**404 HUNT, J.** In considering the question presented by this appeal, it must be remembered throughout that the single note over which this controversy arises—that is, the note for \$2,392.75—was indorsed to the plaintiff by Nickey simply as collateral security for a debt of twelve hundred dollars, due the bank by Nickey. It is upon this note that the plaintiff maintains a right to recover for the face thereof unconditionally and in all events, without reference to the debt of Nickey intended to be secured thereby.

Much space in the brief and argument of the respondent's counsel is devoted to supporting the proposition that an indorsee of a negotiable promissory note, taking the note in good faith, as collateral security for an antecedent debt, and with no other consideration, is entitled to be regarded as a holder of such paper for value, and consequently unaffected by an equitable and valid defense of the maker against the payee.

But we do not understand that the appellant disputes that general proposition of law. Ever since the decision of the su-



preme court of the United States in the case of *Railroad Co. v. National Bank*, 102 U. S. 14, reaffirming the doctrine established by that court in *Swift v. Tyson*, 16 Pet. 1, and reviewing the English and American authorities at length, it may be affirmed as a result of the best cases that the transfer of negotiable paper before maturity as collateral for a pre-existing debt merely, without other circumstances, "if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence," is within the usual course <sup>405</sup> of commercial business, as much as would be its transfer in payment of such debt. "In either case," said Justice Harlan, "the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice."

Applying the principle just stated to the pleadings in the case before us, we find that the indorsement of the note by Nickey to the bank, as a collateral security for his own pre-existing debt, was upon a sufficiently valuable consideration for the transfer to bring the case within the rule which protects the holder of negotiable paper, and entitles the bank to the full benefit of the security. And we now are brought to the real question raised by the appellant, but which has to some extent been lost sight of by the respondent.

The facts pleaded show that Nickey only owed the bank twelve hundred dollars and interest at the time he transferred the Gagnon note for two thousand three hundred and ninety-two dollars and seventy-five cents to it as collateral security, and that the defendant, who was the original maker of the note, has an equitable claim against Nickey, growing out of some partnership relations that existed between them.

The question, therefore, is not whether the bank is a bona fide holder at all, but to what extent is it to be regarded as a bona fide holder for value, and how much may it recover upon such note delivered to it as collateral security only.

The degree of protection to which the bank is justly entitled is, in our opinion, controlled by the amount of the pre-existing debt of the payee of the note to the bank, or the extent of the obligation to secure which the note was passed as collateral.

Daniel on Negotiable Instruments, section 832 a, expresses the rule in this language: "When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to

the amount of the debt which it secures, if there be a valid defense against his transferror being regarded as, at all events, a bona fide holder, and entitled to stand upon a better footing only pro tanto. Thus, such a holder could recover against an accommodation <sup>406</sup> party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper."

The pledgee of the note is fully protected against loss by its right to recover the full amount of the debt due to it by the payee. Its rights are preserved, which is all it may reasonably ask.

This general principle was recognized over fifty years ago in the case of *Williams v. Smith*, 2 Hill, 301, where the court after declaring that a person to whom a promissory note was transferred before due as collateral security for indorsements to be made to him, which were afterward made, and who took the note without notice of a defense existing against it in the hands of the person from whom he received it, was entitled to be treated as a bona fide holder, decided, however, that inasmuch as the person who took the note received it as collateral security, he could recover no more than the amount remaining due on the principal demand.

This doctrine was followed in the early case of *Valette v. Mason*, 1 Smith (Ind.), 89. That was an action in assumpsit by an assignee against the makers of a promissory note. The defendants pleaded that the note was assigned to the plaintiff only as collateral security for certain money lent and advanced to the payee. It was decided, as in the case of *Williams v. Smith*, 2 Hill, 301, that the holder of commercial paper assigned as collateral security is entitled to be regarded as a holder for a valuable consideration, and is not bound by equities existing between the payee and the makers which would interfere with the collection of his debt, but that in a suit on such paper the holder is not entitled to recover more than the debt actually due to him, if any part of it has been previously paid, or if there is no good consideration as between the original parties.

Chief Justice Shaw, in *Stoddard v. Kimball*, 6 Cush. 469, briefly discussed the question of what amount the holder of a promissory note, as indorsee, had a right to recover of the maker where the note was negotiated to the plaintiff as collateral <sup>407</sup> security for a debt due to him. He was of the opinion that, the plaintiff having taken the note to secure a pre-existing debt of

a less amount, was holder for value in his own right only to the amount of the debt due him.

In *Youngs v. Lee*, 18 Barb. 187, it was also decided that the bona fide purchaser and holder of a note was entitled to recover the amount paid for it, "with interest, and no more."

Colebrooke on Collateral Securities, section 92, cites several of the cases just referred to, and deduces the following text from them:

"Where negotiable promissory notes, pledged as collateral security, are accommodation paper, without consideration, or subject to an equitable setoff, or, in cases of misappropriation, as between the makers and payees and indorsers thereof, and the collateral securities are of greater amount than the loan represented by the principal evidence of indebtedness, the recovery of the pledgee against the makers upon an action thereon is limited to the amount of his advances. The pledgee in such cases of fraud is a holder for value of the collateral note, as against the makers of such paper, to the extent only of his interest at the time he acquires the title or has notice of the defenses to it." This doctrine is also followed in *Bank v. Barnett*, 27 La. Ann. 177.

In *Fisher v. Fisher*, 98 Mass. 303, the court affirmed the case of *Stoddard v. Kimball*, 6 Cush. 469, and held that where the evidence established the fact that the plaintiffs received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and where it was shown that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them, plaintiffs, as bona fide holders for value and without notice, could recover "to the extent of their debt for which the note was pledged as collateral security."

In *Huff v. Wagner*, 63 Barb. 215, the court sustained the 408 principle that "a bona fide holder of commercial paper, to which, as between the maker and payee, there is a good defense, is entitled to be protected only to the extent of the value which he has paid." The court there further said: "The protection of the holder for value in such cases, as in other cases where the law protects bona fide purchasers against latent claims, is founded upon the idea of protecting such bona fide purchasers for value against any possible loss. And this is the precise reason why a bona fide holder of such paper, which has been transfer-



red to him to secure an antecedent debt, cannot recover against the party who has been defrauded, namely, that he has lost nothing by his reliance upon the face of the paper."

The supreme court of New Jersey, in *Duncan v. Gilbert*, 29 N. J. L. 521, followed a like doctrine, and said: "It is certainly true that the holders of accommodation paper assigned as collateral security can recover against the accommodation maker and indorser no more than the consideration actually advanced."

In a very able review of the decisions upon the question of whether a person situated as was the plaintiff in the case at bar is entitled to the position of a holder of negotiable paper for value, and therefore not affected by the defense of want of consideration to the maker, the court of appeals of Maryland, through Chief Justice Alvey, also decided that all the plaintiff in such a case can recover is the amount due on the debt for which the note has been taken as collateral security. "In such case," said the chief justice, "while the plaintiff is entitled to be treated as a holder for value, it is only so to the extent necessary to protect the debts intended to be secured": *Maitland v. Citizen's Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620.

Tiedeman on Commercial Paper, section 304, states that, where the pledge of a negotiable note is made for the purpose of securing the payment of a debt, the better rule is, that the pledgee can recover the whole of the face value of the note, and hold the balance over and above the amount of his own claim as a trustee for the pledgor. It would seem, therefore, <sup>409</sup> as if he took a different view of the law from that taken by Daniel, although he expressly states in a subsequent part of his text that the pledgee in such a case is a bona fide holder only in respect to the amount of his claim against the pledgor; and, if there be a good defense to an action on the collateral by the pledgor, the recovery of the pledgee is limited to the amount of his claim against the pledgor. But we think that, if the pledgee is to be regarded in such a case (as he undoubtedly should be) as a bona fide holder only to the amount of his claim against the pledgor, and if he be limited in his recovery to the amount of his claim, it is most reasonable that the controversy over the balance be litigated by those directly interested, and that ordinarily the pledgee is not to be held as a trustee for the pledgor.

We are aware that there is a contradiction of opinion as to the attitude of the pledgee who seeks to recover the full amount of the collateral where such amount is in excess of the debt

secured to him; but we are content to adopt the rule sustained by the decisions already cited, which limit his recovery to the amount due to him. In addition to the cases above cited, we may include *Steere v. Benson*, 2 Ill. App. 560, and *Bank v. Hemingray*, 34 Ohio St. 381.

A recent case upon this subject is that of *Farmers' State Bank v. Blevins*, 46 Kan. 536. There the court stated the question substantially as follows: In an action against the maker of the notes which had been transferred before maturity to an innocent and bona fide holder as collateral security for an indebtedness existing between the payee of such notes and the indorsee, is the indorsee entitled to recover against the maker to the full amount of such collateral notes, where such amount exceeds the indebtedness which they were transferred to secure, without regard to any defenses that may exist between the original parties to such notes, or is, in such case, the right of the plaintiff to recover limited to the amount of the principal debt? In that case, as in the one before us, equitable defenses were made by the pleadings; and it appeared that there was a controversy between <sup>410</sup> the maker and the payee of the notes, by which it appeared that the paper was subject to equitable setoffs between the maker and payee. The court answered the question by holding "that the doctrine that the pledgee cannot recover more than the amount of the debt of the pledgor is in accord with natural justice," and that, while it hesitated to state that as a rule, yet it did not think that any other rule ought to be applied without great caution. We are impressed with the reasoning in the Kansas case, and believe it correct in principle, as well as more practical, and well founded by the several decisions relied upon in the opinion of that court and the additional authorities above referred to by us.

There is another point made by the supreme court of Kansas in their decision which is applicable in this case as well. We think that the payee of the note, Nickey, ought to have been made a party to this litigation. Although the bank, under the views that we have taken of the law applicable to its rights really has no interest in the controversy between Nickey and Gagnon, yet it would be eminently proper that the whole controversy be settled in this one action, and that the rights of all parties be determined. As was said by the supreme court of Kansas in the case above cited: "At the commencement of this action to recover on the notes as pledgee, the bank ought to have made Brady a

party. He was the payee of the notes sued upon. He had transferred them by indorsement to the bank, who claims to be an innocent holder for value. Even after Blevins filed his answer, setting up his various defenses as against Brady, and the knowledge of the bank of these equitable defenses, the bank, for protection against Brady, ought to have made Brady a party, as it now insists upon a recovery for the full amount of the notes; and yet it is shown that Brady's pre-existing indebtedness to the bank is less than the face of the notes and interest. As Brady was not a party then, and is not now, he will not be bound by the decision of this court on the question presented."

We think the case at bar is one where the court might properly order the payee of the note to be made a party, and <sup>411</sup> that in the further conduct of the case this ought to be done, provided the pleadings remain as they are.

It follows, therefore, that the motion for judgment on the pleadings was improperly granted. The judgment is therefore reversed, and the cause is remanded to the district court, with direction to overrule said motion, and to proceed according to the views expressed herein.

Pemberton, C. J., and Buck, J., concur.

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**NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—RIGHTS OF ASSIGNEE.**—If a negotiable note is transferred merely as collateral security for a pre-existing debt, and no new consideration is given for it, the assignee takes it subject to all equities existing between the original parties to it: *Loewen v. Forsee*, 137 Mo. 29; 59 Am. St. Rep. 489, and note. He is not a bona fide holder for value, nor entitled to protection against equities and defenses existing between prior parties, of which he had no notice: *Vann v. Marbury*, 100 Ala. 438; 46 Am. St. Rep. 70, and note; *First Nat. Bank v. Strauss*, 66 Miss. 479; 14 Am. St. Rep. 579; *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464, and note. The contrary has, however, been held in a number of cases which are in accord with the principal case: *Rosemond v. Graham*, 54 Minn. 323; 40 Am. St. Rep. 336; *Crump v. Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345, and note; *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518, and note. See *National Bank v. Dakin*, 54 Kan. 656; 45 Am. St. Rep. 299.



## WATTERSON v. E. L. BONNER COMPANY.

[19 MONTANA, 554.]

**HOMESTEADS IN PUBLIC LANDS.**—A homestead may be claimed in public lands belonging to the United States.

**HOMESTEADS—EXEMPTION OF IMPROVEMENTS.**—All outbuildings, fences, and other improvements constitute part of the homestead, and cannot be sold under legal process, unless, taken all together, they exceed in value the amount exempted to the homesteader.

**HOMESTEADS.—AN ABANDONED WIFE MAY CLAIM a homestead exemption.**

**HOMESTEADS—MORTGAGE OF NOT SIGNED BY WIFE.** A mortgage of a homestead not signed by the wife is void, whether it is made on chattel or real property.

Suit to enjoin the defendants from foreclosing a chattel mortgage on improvements claimed as part of a homestead. Plaintiff is the wife of one Watterson, who, with her and their minor children, in March, 1890, located on land described in the complaint, which was then public land belonging to the United States. These parties continued to live on the land until October, 1894, when Watterson deserted and abandoned his wife and family. Before such abandonment, he erected a cabin, some out-houses, and fences upon the land. On April 26, 1894, Watterson executed to the defendant a chattel mortgage on said improvements. This is the mortgage in suit, and plaintiff did not sign nor join in the execution thereof, and shortly before beginning this action filed a homestead on the said land and claimed the said improvements as a part thereof. Judgment for plaintiff, and defendant appealed.

E. Scharnikow, for the appellant.

J. M. Self, for the respondent.

**555 PEMBERTON, C. J.** The first question to be determined is as to whether a person may claim a homestead which is situated on public land of the United States.

This question has been decided by the supreme court of the state of California in a number of cases. In *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248, Chief Justice Sawyer, speaking for the court, says: "The statute does not specify the kind of title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it, not on the title merely. The actual **556** homestead, as against everybody who has not a better title, be-

comes impressed with the legal homestead right, by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed."

In *Gaylord v. Place*, 98 Cal. 472, it is held that "mineral land of the United States located and chiefly used by the owners as a placer mining claim, but also used as a place of residence for himself and family, and to some extent for pasturing stock and raising vegetables, is subject to selection as a homestead. A homestead right does not depend upon the character of the title held or which may be acquired by the party claiming it; but it is impressed on the land to the extent of the interest of the claimant in it, who has actual and rightful possession of the premises at the time of selection, and not on the title merely, which, as between the claimant and his creditors, is a false quantity, to be excluded from consideration": *Brooks v. Hyde*, 37 Cal. 366.

We are of the opinion that the question of the claimant's title to the land upon which a homestead exemption is claimed is immaterial. Whether the title to the land be good or bad is not a matter that concerns the creditor.

In this case the appellant concedes that the plaintiff is entitled to the house in which she and her children live under her claim of homestead, but insists that the homestead claim should not extend to the outhouses, fences, and other improvements included in the chattel mortgage executed by J. A. Watterson.

This question is discussed at length in *Greeley v. Scott*, 2 Woods, 657, Fed. Cas. No. 5746, and in *Conklin v. Foster*, 57 Ill. 104. According to these authorities, the outbuildings, fences, and other improvements constitute part of the homestead, and cannot be sold under legal process, unless, taken all together, they exceed the amount exempted to the homesteader.

<sup>557</sup> It would be a strange kind of benefit to confer upon a farmer a house to live in free from sale under legal process, and refuse him a fence to protect his crops grown upon his homestead: See *Englebrecht v. Shade*, 47 Cal. 627; *Arendt v. Mace*, 76 Cal. 315; 9 Am. St. Rep. 207.

The authorities are so numerous to the effect that the abandoned wife may claim the homestead exemption that we do not think it necessary to discuss the question here: See *Frazier v. Syas*, 10 Neb. 115; 35 Am. Rep. 466; *Collier v. Lattimer*, 8 Baxt.

420; 35 Am. Rep. 711; Kenley v. Hudelson, 99 Ill. 493; 39 Am. Rep. 31.

We are of the opinion that the premises described in the pleadings constituted the homestead of the plaintiff at the beginning of this suit, and prior thereto.

It appearing, therefore, that she did not sign or otherwise join her husband in the execution of the chattel mortgage conveying the same to the defendant the E. L. Bonner Company, the mortgage was for that reason absolutely void, as was held by this court in *American etc. Assn. v. Burghardt*, 19 Mont. 323, ante, p. 507.

We think the foregoing treatment determines all the material questions presented by this appeal. The judgment and order appealed from are affirmed.

Hunt and Buck, JJ., concur.

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**HOMESTEAD—WHO MAY CLAIM—ABANDONED WIFE.**—A wife is entitled to claim a homestead for herself and children out of the property of her husband after he has become a fugitive from justice, if she and her children continue to remain on and occupy the land: *Hollis v. State*, 59 Ark. 211; 43 Am. St. Rep. 28, and note. A wife permanently separated from her husband by agreement, after his neglect to support her, may acquire a homestead: *Kenley v. Hudelson*, 99 Ill. 493; 39 Am. Rep. 31.

**HOMESTEAD—MORTGAGE OF, NOT SIGNED BY WIFE.**—A mortgage—not for purchase money—of his homestead by a married man without his wife's signature is absolutely void: *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681. See *American etc. Assn. v. Burghardt*, 19 Mont. 323, ante, p. 507, and note, monographic note to *Poole v. Gerrard*, 65 Am. Dec. 483-485.

**HOMESTEAD—WHAT INCLUDED WITHIN—BUILDINGS.**—"Homestead," both in the constitution and in the statute, is used in its ordinary or popular sense, or, in other words, its legal sense is also its popular sense. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof: Monographic note to *Pryor v. Stone*, 70 Am. Dec. 348. The only tests are use and value: Note to *Lubbock v. McMann*, 16 Am. St. Rep. 113. The entire premises must not be worth more than the statutory exemption: *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516, and note. The homestead exemption will not cover all buildings which may be erected upon the land whatever may be their character, or for whatever purposes they are designed, merely because the debtor lives in one of them: *Casselman v. Packard*, 16 Wis. 114; 82 Am. Dec. 710. See *Wylie v. Grundysen*, 51 Minn. 360; 38 Am. St. Rep. 509, and note.



## BARRY v. WESTERN ASSURANCE COMPANY.

[19 MONTANA, 571.]

**HOMESTEADS—HEAD OF FAMILY.**—A husband who lives with his family remains the "head" thereof, although he fails to support such family, quarrels with his wife, and occupies a separate bed. Such treatment on his part, coupled with the fact that the wife supports the family, does not make her the "head" thereof, within the meaning of that word as used in homestead laws.

The plaintiff, Mrs. Barry, sued the defendant to recover the amount of a policy of insurance issued by the latter to her on certain property claimed by her as her dwelling-house and homestead, and also claimed to be exempt to her as the head of a family. The defendant resisted her claim, on the ground that certain of her creditors had commenced suits against her, and attached all moneys in the hands of defendant belonging to her; that such creditors subsequently recovered judgment against plaintiff, and issued execution thereon; and that defendant paid over to the sheriff under such execution all moneys due under the policy in suit. Judgment for plaintiff, and defendant appealed.

C. R. Leonard and J. W. Cotter, for the appellant.

W. S. Shaw, for the respondent.

**572** HUNT, J. The plaintiff's principal contention is, that the money due to her under the insurance policy was exempt **573** from levy by attachment in the hands of the company because the house destroyed was her homestead, and because she was the owner thereof and was the head of a family. The appellant, on the other hand, argues that plaintiff was not the head of a family, and was not, therefore, entitled to claim a homestead exemption. If, therefore, the privilege of claiming exemption of the property destroyed as a homestead is available to plaintiff at all, it is because the evidence has established her headship of the family. We are thus obliged to look into the facts to ascertain whether her relation as the head of the family was established. In doing this we shall only regard the plaintiff's testimony.

It appears that Mrs. Barry and her husband had been married for thirty-two years before this suit was tried, and lived and cohabited together until the last eight years before the fire destroyed the property involved in this suit. They had a large family, including four minor children. Mrs. Barry appears to

have been an industrious woman, and in the later years of her married life to have been the main support of the children. The husband, Barry, was evidently a lazy man, content to allow his wife to do most of the work whereby a support was obtained for his wife and children. To use his own language on this point: "She managed to support them. I thought it was all right anyhow." At times he was away mining, but returned at intervals, and lived with his family, although during the past eight years he did not sleep in the same house with his wife, but had a bed in a little cabin in the end of the yard back of the main house. He admitted the knowledge of his obligation to support his family, and that it was his own fault to a great extent that he had not been steadily at work, and said that he often had "little spats" with his wife, and would leave because his presence was not wanted. The house which was burned seems to have been kept for a time as a boardinghouse by Mrs. Barry, and the debts for the payment of which the insurance money was attached were contracted by her. She was a sole trader and doing business on her own account. The insurance was originally written in <sup>574</sup> the name of her husband, James F. Barry, but it was afterward transferred to the plaintiff in this suit.

Under this evidence, we do not think Mrs. Barry can be held to be the "head" of the Barry family, as the term is used in the statute exempting homesteads. Ordinarily, the husband is the head of the family. He is the parent, if living, whom the law first recognizes as having a right to have a home for his family protected and secured. From the natural relation existing between the husband and his wife and children, there arises a duty upon him, both moral and legal, to support his family; but his legal headship of the family cannot be destroyed because of a mere dereliction of duty on his part. It is clear to us that, if the property had been seized for a debt of Mr. Barry, he could have claimed its exemption as a homestead. It was the residence of his wife and children, and his home. There was no such change in his relations with his family as would impair his homestead rights: *Carrington v. Herrin*, 4 Bush, 624. The circumstance that Barry was not on the best terms with his wife, and occupied a different bed, even when considered with his general indisposition to support his family, cannot change the law. It was an unhappy family; that is all; but the husband was none the less the head of it.

The order denying a new trial, and the judgment, are reversed and the cause is remanded.

Pemberton, C. J., and Buck, J., concur.

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**HOMESTEAD—HEAD OF FAMILY—WHO IS.**—Any man who has a wife is the head of a family: Monographic note to *Wade v. Jones*, 61 Am. Dec. 589, as to who is the head of a family. A debtor is entitled to the benefit of a homestead exemption only when he is a housekeeper and has residing with him some person whom he is under a natural or moral obligation to support, or who is dependent upon him for support: *Bosquett v. Hall*, 90 Ky. 566; 29 Am. St. Rep. 404, and note. See *Emerson v. Leonard*, 96 Iowa, 311; 59 Am. St. Rep. 372, and note; *Bank of Versailles v. Guthrey*, 127 Mo. 189; 48 Am. St. Rep. 621.

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## MONTANA NATIONAL BANK v. MERCHANTS' NATIONAL BANK.

[19 MONTANA, 586.]

**ATTACHMENT—GARNISHMENT—LIEN OF.**—Garnishment by plaintiff of a debt due the defendant creates an inchoate right to a lien upon the property of the garnishee.

**ATTACHMENT—GARNISHMENT—LIEN OF.**—If a garnishment has been levied by plaintiff upon a debt due the defendant, in the hands of a third person and a creditor of the latter, with knowledge of the garnishment, subsequently brings an action against the garnishee, who is insolvent, a court of equity may interfere to preserve the inchoate right of lien created by the garnishment, and may divide the property of the garnishee between the claimants pro rata.

On November 9, 1892, the Montana National Bank began an action against the Journal Publishing Company to recover a debt of twenty-six thousand four hundred and twenty-four dollars and fifteen cents. On the same day, it caused to be issued a writ of attachment, and garnished the sum of eight thousand nine hundred and thirty-nine dollars and eighty-nine cents in the hands of the Daily Journal Company and due from it to the said Journal Publishing Company. The plaintiff recovered judgment against the defendant for the amount sued for, on November 29, 1892. Subsequently to the commencement of said action, and with knowledge of the proceedings thereunder, the Merchants' National Bank commenced an action against the Daily Journal Company to recover the sum of twenty-five thousand three hundred and seven dollars and forty-three cents. On the same day, it caused to be attached all the property of said Daily Journal Company. On November 22, 1892, it recovered judgment against said company for the sum sued for, and on the same day



caused execution to issue, which was placed in the hands of the sheriff, who levied on all the property of said company, and sold it on December 1, 1892, realizing the sum of twenty-one thousand dollars therefor. On the latter named date, the Montana National Bank brought suit against the Merchants' National Bank, the Daily Journal Company, the Journal Publishing Company, and the sheriff who made the said sale for the purpose of having applied on its judgment against the Journal Publishing Company the amount of the indebtedness from the Daily Journal Company to said publishing company and which it had garnished. Judgment for the plaintiff, and the defendants appealed.

McConnell, Clayberg & Gunn, for the appellants.

H. G. McIntire, for the respondent.

588 BUCK, J. It is claimed by appellants that the complaint of respondent does not state a cause of action, by reason of its failure to allege that any attachment had ever been levied on any indebtedness due from the Daily Journal Company to the Journal Publishing Company. Appellants contend that the complaint shows that only property and credits were attached by respondent, and not debts. The complaint is somewhat defective in the allegations as to the attachment of an indebtedness, but upon the trial it was stipulated between appellants and respondent that no claim was made in the action, except on account of the attachment of the alleged indebtedness of the Daily Journal Company to the Journal Publishing Company. The main issue of fact on the trial was as to whether there was any such indebtedness or not. Having entered into this stipulation, and the issue aforesaid having been tried, we are satisfied that appellants are in no position to take advantage of the alleged defect in the complaint. It would not be fair to allow them to raise this point. Moreover, the complaint alleges "that at the time of the service upon it of the writ of attachment and notice, the Daily Journal Company owed the Journal Publishing Company the sum of nine thousand and thirty-nine dollars and eighty-nine cents, and that said sum, so owing from said Daily Journal Company to said Journal Publishing Company, and so as aforesaid by said plaintiff attached and garnished, is still owing and wholly unpaid."

We proceed at once to the main issue of law involved. Appellants state their position as follows: "Under our statutes, no lien is created, by virtue of an attachment, either upon the prop-

erty of the garnishee or upon the property of the defendant in the garnishee's possession."

<sup>589</sup> Neither the words "garnish," "garnishment," "garnisher," or "garnishee" appear in the Montana attachment statutes. The sheriff is commanded by the writ of attachment to attach the property of the defendant, whatsoever its character—whether capable of actual possession or of constructive seizure only. But we will use the terms aforesaid for convenience in this opinion.

As to a chattel capable of manual delivery in the possession of a garnishee, we cannot agree with appellants that no lien results from the garnishment. An inchoate lien or right is acquired by garnishment as to such chattel: See *Reed v. Fletcher*, 24 Neb. 435; *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635; 8 Am. St. Rep. 224; also, *Focke v. Blum*, 82 Tex. 436; *Smith v. Bridge Co.*, 13 Ill. App. 572.

In this case, however, a debt was garnished, and just what right in connection with the property of the garnishee was acquired by virtue of the garnishment is a question of difficulty. Is the garnisher of a debt substituted only to the right of the creditor of the garnishee, or does he acquire, by virtue of the garnishment, a right different in the power of enforcement from such creditor's right? To hold that he does not would be almost to declare the statute permitting a garnishment of a debt a nullity. If there is a mere substitution, the garnishee, particularly if insolvent, can ignore the garnishment by disposing of all his property, and thereby absolutely defeat any practical gain from the process. On the other hand, it would not do to hold that, by the mere service of the notice of attachment, a specific lien is created upon any property of the garnishee. The garnishee's right to deal lawfully with his own property cannot be disregarded, and must be carefully preserved. It was manifestly the intention of the legislature, in framing the attachment laws of Montana, however, to give some practical advantage by virtue of legal process to the diligent creditor who garnishes a debtor of his debtor, as well as to a creditor who actually attaches tangible property or garnishes a chattel capable of manual delivery.

In *O'Brien v. Insurance Co.*, 56 N. Y. 52, an insurance <sup>590</sup> company was garnished for a debt due a debtor of the plaintiff, and the court said (the statutes of New York being substantially the same as those of Montana) that the effect of the garnishment was to impound the debt—that is to say, to take it into the cus-

tody of the court—as effectually as a seizure of chattels capable of manual delivery.

In *North Star etc. Shoe Co. v. Ladd*, 32 Minn. 381, an insurance company owing the defendant was garnished, and the court said: “The garnishment is in effect an attachment of the ‘indebtedness’ of the garnishee to the defendant. Though, technically speaking, it may not give a specific lien upon such indebtedness, its effect in conferring upon the plaintiff a specific right, over and above that of a mere general creditor, to the indebtedness for the payment of his claim, is substantially analogous to that acquired by an attachment of tangible property.”

Between the impounding of the debt itself, however, and the acquiring of a specific lien upon the property of the garnishee, there is a marked difference, at least, in so far as the garnishee's right to deal in good faith with his own property is concerned. Yet, if a debt is impounded—taken into the custody of the court—is it not the duty of the court to preserve, so far as lies in its power, any right of the garnisher as against a subsequent attaching creditor who invokes its process in hostility to any such right?

The *Daily Journal Company* had assets worth twenty-one thousand dollars. It owed the *Merchants' National Bank* twenty-six thousand four hundred and twenty-four dollars and fifteen cents and the *Journal Publishing Company* eight thousand nine hundred and thirty-nine dollars and eighty-nine cents. These assets constituted its sole and only means of payment—or, rather, part payment—of said debts. The object of the attachment statutes is to reward diligent creditors. Respondent served notice of its garnishment before the *Merchants' National Bank* levied its attachment, and used the utmost diligence, apparently, to obtain an actual benefit from this garnishment. Under the statutes of the state, respondent was in no position to obtain a judgment against the garnishee until after it had <sup>591</sup> obtained a judgment against its direct debtor. But the judgment was not obtained until November 29th, and at that time all the assets of the garnishee, the *Daily Journal Company*, had been seized and advertised for sale by the sheriff under the execution issued on the judgment of the *Merchants' National Bank* against its debtor, obtained on November 22d. The property was sold on December 1st, and on that day the respondent commenced this action in equity against appellants, thereby availing itself of the only practical remedy left to it. Proceedings supplemental to



execution would have been idle and inadequate under the circumstances.

No direct question arises here, as between the garnishee or any person dealing with it without notice and the garnisher, with reference to any specific lien on the former's property while actually engaged in business. The Daily Journal Company is a lifeless and hopelessly insolvent corporation. The contest is strictly between the two creditors as to its assets, each claiming by virtue of its attachment. Even on the theory that the only right acquired by respondent through its garnishment was a substitution to the rights of the Journal Publishing Company as against the Daily Journal Company alone, was there any complete substitution? If there had been a full and complete substitution, at the very moment the notice of garnishment was served on the Daily Journal Company, respondent might have sued for the debt due the Journal Publishing Company and taken the tangible property of the Daily Journal Company into legal custody by direct attachment. As stated, however, respondent was in no position to sue the Daily Journal Company until November 29th, when it obtained its judgment, and at that time all the assets had been advertised for sale, and were actually sold by the sheriff two days later. If the service of the notice of garnishment by respondent through the court was not the commencement of a proceeding to reach the assets of its debtor, then the law permitting the garnishment of a debt is a nullity, at least so far as this case is concerned. We are of the opinion that, as to the Merchants' National Bank, respondent acquired an inchoate right to a lien as to the property of the <sup>592</sup> Daily Journal Company by virtue of this garnishment. By service of the garnishment respondent took the first legal step necessary to the possible perfection of a lien, and the judgment finally obtained as to the Daily Journal Company perfected the lien and the right initiated thereto by the service.

When the Daily Journal was garnished by respondent, it was notified by the court to hold its debt to the Journal Publishing Company for the benefit of respondent. It became in a sense the agent of the court for that purpose. Hence the Daily Journal Company could not have assigned all its assets for the benefit of its one creditor, the Merchants' National Bank, to the exclusion of respondent's right after the notice of garnishment was served. The law could have been invoked to prevent any such assignment. And yet of the same court which would have re-

strained any such assignment the Merchants' National Bank demands identically what would have been the result of such an assignment. Unquestionably, however, had the Daily Journal Company, after it had been garnished, seen fit to make an assignment for the benefit of both its creditors, it could have done so.

And from this it follows that the right to a lien initiated by respondent by virtue of its garnishment, so far as the Merchants' National Bank is concerned, was only what pro rata interest respondent would have been entitled to receive had a general assignment been made by the Daily Journal Company for the common benefit of both its creditors. To this extent alone is respondent entitled to a portion of the twenty-one thousand dollars realized from the sale of the assets of the Daily Journal Company—of course, with interest thereon from the time appellants withheld it.

It is held in the decisions of some of the states that a court of equity will not interfere to protect an attachment lien. For such a doctrine we are unable to find any sound reason.

The case is remanded, with directions to the lower court to enter a decree in accordance with the views herein expressed. It is also ordered that each side in this appeal pay its own costs.

Pemberton, C. J., concurs.

Hunt, J., disqualified.

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**GARNISHMENT—EFFECT AS A LIEN.**—A notice of garnishment served upon a debtor gives the creditor a right of action against the garnishee for money or property in his hands, owing or belonging to the party against whom the writ runs; but it does not create a lien on all the garnishee's property which may subsequently be delivered in payment of the debt: *Hulley v. Chedic*, 22 Nev. 127; 58 Am. St. Rep. 729, and note. See *Cottrell v. Varnum*, 5 Ala. 229; 39 Am. Dec. 323; *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635; 8 Am. St. Rep. 224, and note.

**GARNISHMENT—PRIORITY OF LIENS.**—An action in equity will lie to determine the priority of liens where there has been service of notices upon the garnishee, and other creditors, who have obtained judgments and levied executions upon the garnished property, and threaten to sell the same under execution: *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635; 8 Am. St. Rep. 224.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**STATE v. MOORE.**

[50 NEBRASKA, 88.]

**APPROPRIATION OF PUBLIC MONEY, WHAT IS NOT.--** Neither a promise on the part of the state to pay moneys for a bounty, nor promise on the part of the legislature to make an appropriation, nor a pledge of the faith of the state, can amount to an appropriation.

**THE OBLIGATIONS OF A STATE MAY BE AVOIDED** by a failure to make the appropriations necessary to discharge them.

**APPROPRIATION OF PUBLIC MONEYS DEFINED.--** To appropriate is to set apart from the public revenue a certain sum of money for a specific object in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other.

**APPROPRIATION OF PUBLIC MONEYS.—CERTAINTY** IN THE AMOUNT appropriated is essential to a valid appropriation of public moneys. It cannot be certain or specific where it is to be ascertained only by the requisitions which may be made by the recipients.

**APPROPRIATION OF PUBLIC MONEYS FOR THE PAYMENT OF BOUNTIES, WHAT INSUFFICIENT.—**A statute providing for the payment of a bounty of a certain sum per pound for an article to be thereafter produced or manufactured within the state, and that when any claim made under the act is presented and verified as therein required, the auditor of the state shall draw a warrant on the treasurer thereof for the amount due, does not constitute a valid appropriation of public moneys, because it cannot be ascertained in advance what amount will become payable during any one year, nor what taxes should be levied to discharge the liabilities created by the statute.

**STATUTES, CONSTRUCTION OF BY DEPARTMENTS OF GOVERNMENT.—**Where the legislature in framing a statute employs language similar in its import to the language of other acts which have received a practical construction by the executive de-



partment and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given in the earlier.

Charles F. Manderson and W. S. Summers, for the relator.

A. S. Churchill, attorney general, and George A. Day, deputy attorney general, contra.

<sup>90</sup> IRVINE, C. This is an original application for a writ of mandamus to compel the respondent, the auditor of public accounts, to draw a warrant in favor of the relator. The right to the warrant is claimed by virtue of "An act to provide for the encouragement of the manufacture of sugar and chicory, and to provide a compensation therefor": Sess. Laws 1895, c. 1. By the first section of this act it is provided "that there shall be paid out of the state treasury to any person, firm, or corporation engaged in the manufacture of sugar in this state from beets, sorghum, or other sugar yielding canes or plants grown in Nebraska, the sum of five-eighths of one cent per pound upon each and every pound of sugar so manufactured under the conditions and restrictions of this act." This is followed by a further provision whereby persons establishing after the passage of the act additional factories shall receive an additional bounty of three-eighths of one cent per pound. Section 2 provides that no money shall <sup>91</sup> be paid upon sugar not containing at least ninety per cent crystallized sugar, nor upon sugar produced from beets for which as much as five dollars per ton shall not have been paid by the producer, nor upon sugar produced from beets raised by a manufacturer of sugar. Means of determining these facts are then provided by the act. Following sections provide in the same manner for bounties upon chicory. Section 8 is as follows: "When any claim arising under this act is filed, verified, and approved by the secretary of state as herein provided, he shall certify the same to the auditor of state, who shall draw a warrant upon the treasurer for the amount due thereon, payable to the party or parties to whom said sum or sums are due." By section 9 of the act it is provided that it shall be in force a period of three years. The pleadings establish that the relator has manufactured sugar and presented proof thereof entitling it to a bounty of eight hundred and five dollars. The auditor justifies his refusal to issue a warrant upon two grounds: 1. That there is no lawful appropriation out of which such bounties may be paid; and 2. That if there be such an appropriation, it is in excess of

the power of the legislature to make such expenditures, appropriations for other purposes having exhausted the power. No question is raised as to the general validity of statutes providing for bounties. Of the two questions presented, we find it necessary to consider only the first.

It is conceded that the legislature has not, in any general appropriation act or in any way outside of the particular act already cited, made a provision for the payment of the bounty claimed. It is, however, contended that in the provisions quoted from the act of 1895 there exists an appropriation wherewith to pay the bounty created. It is solely to this question that we direct our attention. It will be observed that the act, in brief, designates the amount of bounty to be paid for each pound of sugar manufactured, provides for the manner of ascertaining the amount of sugar manufactured, and directs the auditor, on production of proof of the <sup>92</sup> amount, to draw his warrant upon the treasurer therefor. It does not limit in any way the total sum of money to be so expended, and by its terms the act is to endure for a period of three years. By section 19 of article 3 of the constitution it is provided that "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." By section 3 of article 3 it is provided that the sessions of the legislature shall be biennial, except as otherwise provided in the constitution. By section 22 of article 3 it is provided that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution." Do the provisions of the act under consideration constitute a "specific appropriation" for the purpose designated within the meaning of these constitutional provisions, and did the legislature so intend? The relator contends that, having accepted the provisions of the act by manufacturing the sugar for which it claims the bounty, its relations with the state are contractual, and that the state cannot refuse payment, because to so do would be to impair the obligations of its own contract. There is, however, a broad distinction between the moral, and even in one sense the legal, obligation of a state to make a payment, and the duty or the power of its officers to fulfill that

obligation. Under constitutions such as ours an appropriation for the purpose is indispensable to authorize the state's executive officers to make a payment, no matter how great the moral or the legal obligation may be on the part of the state to make such payment. The state being sovereign, while it may incur obligations, there is no method except those by itself established whereby such obligations may be enforced, <sup>93</sup> and it is in general for the legislature by means of an appropriation to recognize an obligation of the state and permit its enforcement. As said in *Ristine v. State*, 20 Ind. 328: "A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment." And, as said by the same court in *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, while clearly recognizing the obligations of a contract entered into by the state, "there is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued. . . . Nor is this the only method under such a constitution as ours by which a state may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object. . . . The legislature has, therefore, the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract. Creditors who accept the obligations of the state are bound to know that they cannot enforce their claims by an action against the state directly nor by an action against its officers where no appropriation has been made as the constitution requires." Such citations might be indefinitely multiplied, but the distinction between the obligation of a state to fulfill its contracts and the power of its ministerial officers to fulfill them in the absence of legislative authority is so marked and so well settled that we would not have gone <sup>94</sup> to this length in pointing it out were it not for the prominence given in argument to the proposition that a con-



tractual relation exists, and that therefore it should be enforced in this proceeding. It may be conceded for the purposes of this case that the premises of the relator are sound. Still, it does not follow that the writ should issue in the absence of a valid appropriation. The relator contends that the language of the act itself created such an appropriation, and cites authorities for the purpose of establishing that to constitute an appropriation the word "appropriation" or "appropriate" is not essential; that it is sufficient that an intention to make an appropriation is disclosed by the act. This also may be conceded with the qualification that it is the settled law of this state that there can be no implied appropriation: *State v. Wallichs*, 15 Neb. 609. By that we understand that an appropriation cannot be implied from the fact that the legislature has by law created an obligation to make a payment. In addition to this, it must appear that it has provided for the payment by a constitutional appropriation; in other words, the appropriation must be express, although the expression may be in any language evidencing the intent and need not be in any set form of words. Therefore, we cannot say, because the legislature did not in this act use the word "appropriate," that it does not carry an appropriation. To solve the question we must consider the meaning of the term "appropriation" as used in the constitution, and ascertain whether, in the law, the legislature has evidenced its intention to perform the act designated by that term.

The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament <sup>25</sup> of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. Three evils were at that time felt. In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives

by dispensing for long periods with sessions of parliament. By requiring appropriations for limited periods it was sought to remedy all three evils—the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary. The first two objects have been the subjects of repeated comment. The third, in view of our constitutional provision for biennial legislative sessions, and limiting the duration of appropriations to the end of the quarter succeeding the following session, justifies us in quoting the following from 2 Hallam's Constitutional History, chapter 15, page 330: "The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to order by their warrant any moneys in the exchequer, so appropriated, from being issued for any other service, and the officers of the exchequer to obey any such warrant. This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for": See, also, Creasy on the Constitution, 293. When our governments, state and federal, <sup>96</sup> came to be established, the requirement of legislative appropriations was adopted from England, along with many provisions having in view the preservation of the liberties of the people, and our own state constitution in the provisions quoted is somewhat more strict and more in accordance with the English practice than either the federal constitution or the constitution of most of the other states. Having in view the origin and history of appropriations, as well as the general lexicographic meaning of the word, to "appropriate" is to set apart from the public revenue a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. This definition cannot be too strict as applied to our own constitution containing the requirement that the appropriations must be specific. In *Ristine v. State*, 20 Ind. 328, "appropriation" is defined to be "an authority from the legislature given at the proper time and in legal form to the proper officers to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against

the state." In *Clayton v. Berry*, 27 Ark. 129, it is said that "‘appropriated by law’ means the act of the legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors." In *Humbert v. Dunn*, 84 Cal. 57, the court said: "Has the legislature fixed the amount of the claim and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation." In *McCauley v. Brooks*, 16 Cal. 11, it is said: "To an appropriation within the meaning of the constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." It will be observed that each of these definitions includes as one of its requisites certainty as to the amount appropriated. In *Stratton v. Green*, 45 Cal. 149, the court said: "By a specific appropriation we understand an act by which a <sup>97</sup> named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand." This definition was quoted with approval by the supreme court of Nevada in *State v. La Grave*, 23 Nev. 25. We are not without a judicial definition of the term in our own state. In *State v. Wallichs*, 12 Neb. 407, the court said: "Specific appropriation means a particular, a definite, a limited, a precise appropriation." This definition was approved in *State v. Wallichs*, 16 Neb. 679.

We might well rest the case here, holding that the act in question was not an appropriation because not falling within the definitions of that term as given by our own court, and reinforced by the courts of other states and by a consideration of the history of the subject; but the earnestness and ability with which the case has been presented by the relator, as well as the importance of the interests which it is claimed are affected by this decision, justify us in stating the results of the further investigation which we have made, with the aid of counsel in the case. In *State v. Weston*, 4 Neb. 216, it was held that no appropriation by the legislature was necessary in order to authorize the payment of salaries fixed by the constitution for officers created thereby. The reason was found in section 25 of the schedule, directing the auditor to draw warrants for the payment of such salaries; and it was stated that this provision being contained in the constitution, it operated as a continuing appropriation for that purpose, and was not annulled by the requirement in the same instrument of biennial appropriations for other purposes. This case by no means conflicts with the conclusion we have indicated, because



the constitution fixes the amount of the salary and the time of its payment. Shortly afterward the court, in *State v. Weston*, 6 Neb. 16, held that the rule established in the former case applied only to officers whose offices were created by the constitution, and that for offices created by the legislature a specific appropriation <sup>98</sup> was required. In *re Groff*, 21 Neb. 647, 59 Am. Rep. 859, involved incidentally a question as to the validity of an appropriation for the payment of the salaries of district judges. The appropriation bill included a single item for the salaries of district judges of ninety-five thousand dollars. While it was intimated that, under section 25 of the schedule of the constitution above referred to, a judge might be entitled to the salary in the absence of a legislative appropriation, it was held that this appropriation was sufficient. But it will be observed that it was specific only in its gross amount and in its general object. It is hardly possible that the court would have considered an appropriation of "so much as may be necessary," without fixing any amount, as a valid appropriation, were a legislative appropriation necessary. In *State v. Babcock*, 24 Neb. 787, the court considered an act to provide for the selling of unsold lots and lands belonging to the state, in the city of Lincoln, and appropriating the proceeds of such sale to the construction of the capitol. It was held that the lands having been sold under the provisions of that act, there was an appropriation of the amount realized for the purpose designated. It is true that at the time of the passage of this act the amount appropriated thereby was not in dollars ascertained. It was equivalent to the appropriation of the lands themselves, and was limited to the proceeds of those lands. The uncertainty in amount arose not in regard to demands of the claimant to the fund, but in regard to the amount of the fund itself. No discretion was vested in the executive officers as to the amount to be disbursed. There is here a broad distinction. By section 1, article 9, of the constitution the legislature is required to "provide such revenue as may be needful" by levying taxes, etc. It is essential that appropriations shall be limited in amount, in order that the legislature may know what revenue shall be needful, and provide therefor. But when the state has property in its possession there can be no objection to appropriating the proceeds of the sale of that property, <sup>99</sup> because the value of the property itself limits the appropriation, and no uncertainty arises in regard to the revenue. An appropriation may

be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients. The case of *State v. Moore*, 40 Neb. 854, much relied on by the relator, is in nowise in point. In that case, there was a specific, limited, precise appropriation, in express terms, of a certain sum of money for a certain purpose, and the question was as to the authority of the legislature to appropriate money for that purpose; and further, as to whether the amount designated should control as against the amount justly required. The fact of the appropriation was not contested and was incontestable. The foregoing cases comprise those which it is claimed give color to the relator's contention. We think none of them, in fact, tends in any way to support it. On the other hand, we might cite many cases illustrating how strictly the court has insisted upon express appropriations, in conformity with the constitution, in order to justify an expenditure, among them *State v. Wallichs*, 12 Neb. 407; 15 Neb. 457, 609; 16 Neb. 679. One case quite closely in point is *State v. Babcock*, 18 Neb. 221. In that case, a statute was under consideration whereby it was provided that if any county treasurer shall have paid into the state treasury any greater sum of money than is legally and justly due, the auditor shall issue his warrant for the amount so overpaid, which shall be paid out of the fund or funds so overpaid on said warrant. This act provided as specifically for what purpose the warrant should be drawn, and in whose favor, as the act we are considering. It contained as specific a direction to draw the warrant, and it was at least as certain in the amount appropriated; more so, we think, because it must be less than the amount actually received <sup>100</sup> by the treasurer, while in this case, if we should hold the act to be an appropriation, it might appropriate in itself vastly more than the whole revenue of the state. But the court held that this was not an appropriation and did not justify the drawing of a warrant. The act cannot be treated as an appropriation, therefore, because it is not certain and limited in its amount. It is contended that the circumstances render a limit impossible. If so, it might be an argument against the validity of any appropriations for such a purpose. It cannot be an argument in favor of the validity of this one. But the very fact that the number of pounds of sugar which might be manufactured under the provisions of the act cannot be ascertained in advance

renders it the more necessary for the legislature to fix a limit beyond which the expenditure for that purpose may not go. Otherwise it is impossible to provide a revenue with a view to the appropriations made.

It is contended, in answer to the objection that appropriations cannot extend beyond the end of the quarter following the adjournment of the next session of the legislature, that this may be treated as a valid appropriation for that period. But by section 9 of the act it is expressly provided that it shall endure for three years, which would be beyond the constitutional limit. Therefore, the legislature could not have intended the act to operate as an appropriation; or, if it so intended, it transgressed its powers, and, the period provided for being an important element, this invalid portion of the act must be held to have operated as an inducement to its passage, and therefore would, if construed as an appropriation act, invalidate the whole measure.

Some of the decisions of other states seem at first blush to conflict with some of the views herein expressed, but we think the conflict is more apparent than real. Thus, in many states there is no provision by constitution limiting the duration of appropriations. Accordingly, it is, in such states, held that general acts of the legislature <sup>101</sup> creating an obligation of the state and fixing the amount to be paid may operate as a continuing appropriation. As for instance, in Colorado: *In re Continuing Appropriations*, 18 Colo. 192; in Alabama: *Nichols v. Comptroller*, 4 Stew. & P. 154; *Reynolds v. Taylor*, 43 Ala. 420; in Wyoming: *State v. Burdick*, 4 Wyo. 272. In this class fall all those cases which hold that a statute creating an office and fixing the salary constitutes a continuing appropriation for its payment. Again it is held in some states that an appropriation may be implied. In these states the constitution does not require all appropriations to be "specific," and the doctrine is contrary to the decisions of this court. So, too, in states having similar or somewhat similar provisions to our own, implied, indefinite, and continuing appropriations have been enforced on the ground that they were made by the territorial legislatures, and that the state constitutions were not retroactive in their effect. Such seems to be the doctrine in Montana and South Dakota. In Illinois, an act of the legislature appropriated the proceeds of a certain tax to a particular purpose. It was held that this was sufficient, although the amount to be derived from such tax was then unknown: *People v. Miner*, 46 Ill. 384.



See, also, *State v. Hipple*, 7 S. Dak. 234. The remarks made with reference to *State v. Babcock*, 24 Neb. 787, are applicable to this class of cases. But Kansas, under constitutional provisions like our own, holds otherwise: *Martin v. Francis*, 13 Kan. 220. In no case, however, which we have been able to discover, under any constitutional provision has it been held that an appropriation is valid when it is uncertain in its amount, and that uncertainty arises with regard to the extent of the demands or claims which the recipients of the fund may present against it. On the other hand, in nearly all the cases cited, and in many more which might be cited, among them a long line of California cases, wavering in other respects, but always steadfast in this, certainty in amount is treated as an <sup>102</sup> essential requisite of a valid appropriation. We are not without the aid of a construction placed on acts similar to this by the other departments of the government. We are aware that such construction is not conclusive, but when the legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier. In 1877 there was passed (Sess. Laws 1877, p. 213) an act "to provide for the payment of bounties for the destruction of wild animals in the state of Nebraska." This act provided, in brief, that any person killing wolves, wildcats, or coyotes within the state, and presenting the scalps thereof to the clerk of the county in which the same were killed, with other proof, should be entitled to a bounty of one dollar for each of such animals so killed. It was provided that the county clerk should issue a certificate to the person entitled, and that upon the same being filed with the auditor, "said auditor shall draw his warrant on the treasury of the state, against the general fund, for the amount of such certificate, in favor of the person named therein or his assignee." It has never been assumed that this act operated as a continuing or even a temporary appropriation of money wherewith to pay such bounties. Appropriations to fulfill the purpose of the act have since its passage been made in certain years, and in one year at least, to wit, 1889 (Sess. Laws 1889, p. 611), the appropriation was made to cover not only future bounties, but outstanding claims, the previous legislature having failed to make any appropriation. It is a matter of general knowledge that payments of such bounties have been made when

express appropriations existed, and not at other times. In 1875 (Sess. Laws, p. 156) an act was passed providing a bounty for the discoverer of a vein of coal, and providing, also, that warrants should be issued in payment thereof. <sup>103</sup> Once, at least, an item for the payment of such bounties has been included in the general appropriation bill.

We conclude that the provisions of the act in question do not make an appropriation. At most, they create an obligation and provide for the manner of its satisfaction when appropriation shall be made. It was not the intention of the legislature to make an appropriation by the act, and if it had been its intention so to do, such appropriation would be void for uncertainty in amount, and because it transgressed the constitutional limit of time.

Writ denied.

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**APPROPRIATION OF PUBLIC MONEYS—WHAT IS NOT.**—A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge: *Monographic note to Carr v. State*, 22 Am. St. Rep. 638.

**APPROPRIATION OF PUBLIC MONEYS—WHEN EFFECTED.** To an appropriation within the meaning of the constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential that the funds to meet the same be at the time in the treasury, and, in some instances, an act making an appropriation need not name the fund out of which payment is to be made: *Ingram v. Colgan*, 106 Cal. 113; 46 Am. St. Rep. 221. See *monographic note to Carr v. State*, 22 Am. St. Rep. 638-648, on what are appropriations.

**STATUTES—CONSTRUCTION OF—REFERENCE TO SIMILAR LEGISLATION.**—Where the meaning of a statute is doubtful or uncertain, the courts will look into the situation and circumstances under which it was enacted, to other statutes, if there are any upon the same subject: *Parving v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note. A long-established construction of a statute by the officers who execute it ought to have the force of a judicial determination: *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447, and note. See *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658, and note.

## WESTERN WHEELED SCRAPER CO. v. SADILEK.

[50 NEBRASKA, 105.]

A BANK WHICH UNDERTAKES THE COLLECTION OF A CUSTOMER'S CHECK IS GUILTY OF INEXCUSABLE NEGLIGENCE in sending it direct to the drawee bank, instead of through the agency of a third person, provided loss ensues through the failure of such drawee bank.

**BANKING—CHECK, PRESENTMENT OF FOR PAYMENT.** A customer's check should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business.

**BANKING—CHECKS, CHARGING DRAWERS AND INDORSERS.**—It is the duty of the drawee bank to promptly pay the check on the receipt thereof for collection, or to give notice of dishonor, in order to charge the drawer and indorsers. If the check is received by such bank, and there is no question but the drawer has moneys therein sufficient to pay it, its failure to at once make payment is a dishonor of the check, of which the drawer is entitled to notice by the first regular mail on the day following, and such notice not being given, he is released.

**COUNTY TREASURER, DEPOSIT BY OF PUBLIC FUNDS IN A PRIVATE BANK.**—Neither the propriety nor the validity of a deposit by a county treasurer of the public funds in a private bank can be considered in a collateral proceeding. Hence, if he draws a check on such a deposit and gives it to a creditor of the county, who fails to have it presented and collected with due diligence, or to give notice of its dishonor, the treasurer is released from liability to him.

Hastings & McGintie, for the plaintiff in error.

F. I. Foss and W. R. Matson, contra.

**107 POST, C. J.** This was an action by the Western Wheeled Scraper Company, hereafter called the plaintiff, against F. J. Sadilek, hereafter called the defendant, in the district court for Saline county. A trial was had of the issues joined by the pleadings, resulting in a verdict for the defendant in accordance with the peremptory direction of the court. A motion for a new trial having been overruled and judgment entered upon the verdict so rendered, the cause has been removed into this court for review upon allegations of error by the plaintiff company.

Among the facts established by the pleadings and proofs, and as to which there is no dispute, are the following, viz: On the fifteenth day of June, 1891, a county warrant was in due form issued to the plaintiff for three hundred and thirty dollars, being the amount of a claim previously allowed and payable out of the road fund of Saline county. On the tenth day of August, 1891, the plaintiff company, whose place of business was in the city of Aurora and state of Illinois, addressed to John N. Van Duyn, county clerk of said county, the following communication.



"John N. Van Duyn, County Clerk, Wilber, Neb.

"Dear Sir: Our Mr. Arnett informed us some time ago that your county had allowed our claim for three hundred and thirty dollars. . . . <sup>108</sup> If the warrant has been issued, we hereby authorize you to receipt for warrant. If there is money on hand to pay the warrant, kindly send us draft for the am't. If not prepared to pay, please have warrant presented and registered so that it will be paid in its turn. We inclose bill herewith.

Yours truly,

"WESTERN WHEELED SCRAPER CO."

On August 12, 1891, said warrant was by Mr. Van Duyn, as agent for the plaintiff company, presented for payment to the defendant as county treasurer and indorsed, "Not paid for want of funds," and afterward on the same day the defendant, as county treasurer, drew his check to the order of plaintiff for the sum of three hundred and thirty dollars, upon the Bank of Western, situated at the village of Western, in said county, and in which he, as such county treasurer, had then ample funds. Mr. Van Duyn, to whom said check was delivered, on the day of its date, forwarded the same to the plaintiff, who received it through the mail at Aurora on the fourteenth day of August. On the succeeding day, to wit, August 15th, the check in question was by the plaintiff deposited in the Second National Bank of Aurora, by which it was on the same day forwarded for collection and returned to the Bank of Western. Said check was, on the seventeenth day of August, received by the Bank of Western and has not been paid, although said bank continued open for the transaction of business until August 19th, on which day it was closed by order of the state banking board, and is now insolvent. The village of Western is situated about twenty miles distant from Wilber, the defendant's home, and about five hundred miles from the city of Aurora. It has railroad and telegraph connection with both places named, and there was at the date in question another bank thereat in good standing. In addition to the foregoing, it is shown that the time required for the transmission of letters by mail between Aurora and Western does not exceed twenty-four hours, from which the inference necessarily arises that the check forwarded by the Aurora bank on the 15th was <sup>109</sup> received by the Bank of Western during business hours on the 17th.

Is the defendant in this action answerable for the loss resulting from the failure of the last-named bank? We think not. There

is eminent authority for the proposition that a bank which undertakes the collection of a customer's check is guilty of inexcusable negligence in sending it direct to the drawee bank instead of through the agency of a third person, provided loss ensue through the failure of such drawee: *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422; 58 Am. Rep. 728; *Drovers' Nat. Bank v. Anglo-American etc. Co.*, 117 Ill. 100; 57 Am. Rep. 855; *Anderson v. Rodgers*, 53 Kan. 542; *First Nat. Bank of Corsicana v. City Nat. Bank of Dallas*, 12 Tex. Civ. App. 318; *German Nat. Bank v. Burns*, 12 Colo. 539; 13 Am. St. Rep. 247; *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville*, 56 Fed. Rep. 967; 1 Daniel on Negotiable Instruments, sec. 328 a. The principle recognized in the foregoing authorities is that no party, whether a corporation, firm, or individual, can, in contemplation of law, be deemed a suitable agent to enforce in behalf of another a claim against itself. But independent of the rule there stated, the defendant was discharged in consequence of the negligence of plaintiff's chosen agent, the Bank of Western. A customer's check is, in the first place, not designed for circulation as a medium of exchange, and should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business: *First Nat. Bank v. Miller*, 37 Neb. 500; 40 Am. St. Rep. 499. In the second place, it was the duty of the drawee bank to promptly pay the check upon receipt thereof for collection, or to give notice of its dishonor, in order to charge the drawer and indorsers: *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744. Time may be necessary, it is true, for the drawee bank to examine its books in order to ascertain the condition of the drawer's account, but, in the absence of evidence to the contrary, it will be presumed that the officers <sup>110</sup> of the bank were aware of the fact conclusively established by the record, viz., that the defendant had therein to his credit at all times from the 12th to the 19th of August, inclusive of both dates, ample funds for the payment of the amount called for. The check was, therefore, as held in *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, dishonored on the 17th, and the defendant, as drawer, was entitled to notice by the first regular mail, on the 18th: 3 Kent's Commentaries, 105; 1 Daniel on Negotiable Instruments, sec. 1039, and cases cited. It is no answer to say that the defendant is not prejudiced by the neglect to give notice, since he might, had he been promptly advised of the nonpayment of his check, by means of legal process

have anticipated the impounding of the bank by the state, and for the further reason that it is an implied condition of the contract of the drawer or indorser that he shall be promptly notified of the nonpayment or nonacceptance of the bill.

Counsel for the plaintiff indulge in some criticism upon the action of the defendant on account of the deposit in bank of the county funds, and the payment of the warrant after having been indorsed, "Not paid for want of funds." To the first criticism a sufficient answer is, that neither the validity nor propriety of the defendant's action in depositing the funds intrusted to his care can be questioned in this collateral proceeding. The other circumstance which is made the subject of criticism, although not material to the issues, is explained by the fact that the road fund, against which plaintiff's account was chargeable, was overdrawn at the date of the warrant, and that said warrant was, with plaintiff's knowledge and consent, paid by the defendant out of other funds belonging to the county. There is no error in the record and the judgment is affirmed.

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**BANKS AND BANKING—NEGLIGENCE OF COLLECTING BANK.**—If a bank, upon receiving a check from the payee for collection, sends it direct to the bank against which it is drawn, and the latter, although having sufficient funds of the drawer at the time it is received to pay it, neglects to do so, and subsequently fails before payment is made, the negligence of the collecting bank in so sending the check is such as to prevent any recovery by the payee against the drawer: *Wagner v. Crook*, 167 Pa. St. 259; 46 Am. St. Rep. 672, and note. See *Baille v. Augusta Sav. Bank*, 95 Ga. 277; 51 Am. St. Rep. 74, and note.

**BANKS AND BANKING—COLLECTING BANK—DUTY AS TO NOTICE OF DISHONOR.**—There is some diversity of adjudication upon the point whether it is the duty of a bank having a note or bill for collection, to give notice of its dishonor to all the prior indorsers or only to the principal: Monographic note to *Allen v. Merchants' Bank*, 34 Am. Dec. 311. See *West Branch Bank v. Fulmer*, 3 Pa. St. 399; 45 Am. Dec. 651. See monographic note to *Isham v. Post*, 38 Am. St. Rep. 775-777.



**WATTLES v. SOUTH OMAHA ICE AND COAL COMPANY.**

[50 NEBRASKA, 251.]

**LANDLORD AND TENANT—LIABILITY OF TENANT FOR BUILDING DESTROYED WITHOUT HIS FAULT.**—Though a lessee covenants to keep in repair the leased premises and at the expiration of the term to surrender them in as good condition as they were when he entered, ordinary wear and tear and natural decay excepted, he is not required to rebuild or restore a building destroyed without his fault, as by a hurricane. If such liability existed at the common law, that law is modified in this respect by a statute providing that in the construction of any instrument creating an interest in real property, it shall be the duty of the courts to carry into effect the intent of the parties so far as it can be collected from the whole instrument.

**DEFINITION.**—TO REPAIR means to amend or renew, or to restore or make good, an existing thing, not to make a new one. Hence a covenant to repair does not impose an obligation to rebuild what has been destroyed without the fault of the covenantor.

**LANDLORD AND TENANT.**—A lessor is under no obligation to rebuild or restore a building destroyed without his fault, where he has not covenanted to do so.

**LANDLORD AND TENANT—APPORTIONMENT OF RENTS.**—Where a substantial portion of the leased premises is destroyed without the fault of either party, the lessee is entitled to an apportionment of the rent covenanted to be paid and thereafter accruing, in the absence of an express assumption by him of the risk of such destruction.

Charles Offutt, for the appellant.

James H. Macomber, contra.

**254 RAGAN, C.** On the first day of November, 1894, Gurdon W. Wattles and F. L. Cotton entered into an agreement in writing in and by which Wattles leased to Cotton for five years from said date the east one-half of the southwest quarter of the northwest quarter of section 1, township 15 north and range thirteen (13) west of the sixth parallel meridian, "together with the buildings situated thereon." A rent of six thousand dollars was reserved, payable in sixty installments of one hundred dollars each. The first installment was paid at the date of the execution of the lease, and one installment fell due on the first day of each month thereafter. In the lease, Cotton covenanted as follows: "That at the expiration of the term above granted . . . he will quietly and peaceably yield up possession of said premises . . . in as good condition as the same were when entered upon, ordinary wear or damage by fire excepted. . . . It is understood and agreed that the buildings on the above described property have been placed in good repair by [the lessor] and shall be kept in the same condition by [the lessee] during the term of this lease,

natural decay and wear and tear excepted." Cotton assigned his interest in this lease to the South Omaha Ice and Coal Company, hereinafter called lessee, which took possession of the leased premises and began using the same for the purposes for which they were leased; that is to say, for harvesting ice formed on the waters on said leased lands and storing such ice in the buildings thereon. The rent reserved was paid up to the first day of September, 1896. On the twenty-second day of August of said year the buildings on the leased premises "were destroyed and rendered entirely valueless by a violent wind storm or hurricane." Notwithstanding the destruction of the icehouses, the lessor claimed that he was entitled to collect the rent reserved in the lease accruing subsequent to the destruction of the buildings; that he was under no obligation to rebuild the destroyed icehouses, but that the lessee was bound to rebuild <sup>255</sup> the same. The lessee denied that he was bound to rebuild the destroyed icehouses and insisted that he was entitled to an apportionment of the rent reserved until such time as the lessor should rebuild the houses destroyed. The parties made up an agreed case under the provisions of sections 567, 568, and 569 of the Code of Civil Procedure and submitted it to the district court of Douglas county. The parties filed in the agreed case in the district court a stipulation of the facts. This stipulation recited the execution of the lease between Wattles and Cotton; the assignment of his interest in the lease by Cotton to the South Omaha Ice and Coal Company; the covenants in the lease already mentioned; the taking possession of the leased premises by the lessee; the payment of the rent to September, 1896, and the destruction of the icehouse by a hurricane. The stipulation further recited that the premises had been leased for the sole and exclusive purposes of gathering ice formed on the waters on said lands and storing such ice in the buildings situate thereon; that fifteen acres of the demised land were covered with water from which in the winter ice was gathered for storage; that the destroyed buildings were six in number, built together, each one hundred feet long and twenty feet in width, and had a storage capacity for ice of from eight thousand to ten thousand tons; that there were no other buildings or improvements of any kind on the leased premises at the time they were leased or since; that the fair rental value of the entire premises was twelve hundred dollars per year, and that the fair rental value of the premises since the destruction of the icehouses, or without them, was six hundred dollars per year. The district court was of opinion

that the agreements and promises made in the lease by the lessee amounted to a covenant on his part to rebuild the destroyed ice-houses, and that he was liable for all the rent reserved in the lease and entered a decree accordingly. The lessee has appealed.

This case should be treated in all respects as though it was an ordinary action at law by the lessor to recover <sup>256</sup> the rent reserved in the lease, and that the lessee had interposed as a defense the destruction, without his fault or the fault of the lessor, of a substantial part of the leased premises, and invoked in his answer, by way of a cross-petition, the equitable power of the court for an apportionment of the rent.

1. The lessee covenanted to keep in repair the leased premises and at the expiration of the term surrender them in as good condition as they were when he entered, ordinary wear and tear and natural decay excepted. Does this covenant include a promise by the lessee to restore the buildings destroyed without his fault? That it does is the first argument urged in support of the decree. It is insisted that such was the rule of construction applied to such a covenant at common law.

The earliest American case which we have been able to find which supports the contention under consideration, is *Phillips v. Stevens*, 16 Mass. 238, decided in 1819. The lessee covenanted that he "would keep in repair, support, and maintain all and singular the fences and buildings, saving and excepting the natural decay of the same, as should be needful, at his own proper cost and charge; and at the end of said term . . . would quietly leave, surrender, and yield up the premises in as good condition as the same were in" at the date of his lease. The buildings on the leased premises were destroyed by fire without the fault of the lessee, and the supreme court of Massachusetts, in construing the covenant in the lease, held it to be a contract binding the lessee to rebuild the burned buildings.

In *Beach v. Crain*, 2 N. Y. 87, 49 Am. Dec. 369, the lease provided that the lessor should, at his own cost, erect a gate at the terminus of a road on the leased premises and keep the gate there during his pleasure, and that all repairs necessary to be made to said gate were to be made by the lessee. Some person unknown, but without the fault of the lessee, removed the gate, and the court of appeals of New York held that the covenant of the lessee to repair <sup>257</sup> the gate included a contract on his part to replace it with a new one.

In *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115, it seems that the lease contained the usual covenant of the lessee to re-



pair and keep in repair the demised premises. The buildings on the leased land were destroyed by the breaking of the embankment of a reservoir, and this was caused by the act of someone, but not by any fault of the lessee. The court held that the covenant of the lessee to repair bound him to restore or rebuild the destroyed buildings; and the court declared that such had been the settled rule of construction of such a covenant since the time of Edward III.

In *Ely v. Ely*, 80 Ill. 532, the lessee covenanted that he had received the leased premises in good order and condition, and that he would keep them in repair at his own expense, and that at the end of the term he would deliver the same up to his lessor in as good order and condition as when they were entered upon. The buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the supreme court of Illinois held that the legal effect of the covenant of the lessee to keep the demised buildings in repair, etc., was that in case the buildings burned he would rebuild the same.

In *David v. Ryan*, 47 Iowa, 642, the lessee covenanted that she would keep the leased premises in a good state of repair. They were destroyed by fire and the court held that the covenant of the lessee bound her to restore the buildings.

In 1 *Taylor on Landlord and Tenant*, eighth edition, section 357, the rule is stated as follows: "When a tenant is under an express covenant to repair the premises, he is liable to make good all loss and damage which they may sustain, and must even rebuild in case of casualty by fire or otherwise."

In 12 *American and English Encyclopedia of Law*, page 721, the authorities in support of the rule under consideration are collated and the rule is thus stated: "The alteration in the tenant's<sup>258</sup> liability for repairs, produced by his executing a lease in which he makes an express covenant to repair, is so marked that he becomes liable to make good all loss and damage the premises may sustain, and must even rebuild in case of casualty by fire or otherwise."

Among the cases cited in the *Encyclopedia of Law* and by *Taylor* is the case of *Phillips v. Stevens*, 16 Mass. 327, and that case seems to have been relied upon in the cases cited by us from New York, Illinois, California, and Iowa. The court in *Phillips v. Stevens*, 16 Mass. 237, based its decision upon the principle that when one "by his own contract . . . creates a duty or charge upon himself he is bound to make it good notwithstanding any

accident by inevitable necessity, because he might have provided against it by his contract"; and this is the principle upon which the cases from Illinois, Iowa, California, and New York mentioned above were decided.

No one can find fault with the principle that a man should be compelled to perform what he has promised; but, with all due respect to the supreme court of Massachusetts, it seems to us that the court ignored the entire issue. The question there was not whether the lessee was obliged to perform a covenant he had made, but the question was what covenant he had made; that is, whether his covenant to repair and keep in repair the demised premises included within it a contract on his part to rebuild the buildings on the leased premises if they should be destroyed. But in that case, as in the other cases cited, and in every case that we have been able to find which supports the contention of the appellee here, it was taken for granted that the rule at common law was that a covenant by a lessee to repair was equivalent to and involved a covenant to rebuild. Assuming, however, that such was and is the rule of construction at common law, are we bound by that rule?

Section 1, chapter 15, of the Compiled Statutes of this state provides that so much of the common law of England as is applicable and not inconsistent with any law passed <sup>259</sup> or to be passed by the legislature of this state is adopted and declared to be law within the state. Section 53, chapter 73, of the Compiled Statutes provides that "in the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." If, then, the rule at common law is as is contended by the appellee, it is at most but a rule of construction, and we are not bound to apply that rule of construction to a real estate contract if to do so would result in giving to the contract an effect not within the contemplation or intention of the parties at the time it was made. We do not know why a lease for real estate should not be construed as any other contract—why we should not apply to it the test universal among all civilized peoples, namely, to look to the subject matter of the contract, the language of the parties, and ascertain, if we can, what was their intention; on what proposition did the minds of the contracting

parties meet; what did they consciously consent to. If we apply this rule of construction to the contract under consideration, we have for subject matter of the contract a small tract of land, fifteen acres of which was covered with water. From this water ice could be harvested in the winter season, and stored in buildings then standing upon the leased premises. The lessee accepted his lease and entered upon these premises to use them solely for the purposes of harvesting and storing ice. When he did so he stipulated that the leased premises were in good repair, in good condition, and he promised that he would keep them in good repair and at the expiration of his lease so surrender them. What did the parties to this contract understand and intend by the terms "repair" and "keep in repair"? These words "repair" and "keep in repair" are not technical words, nor should they be given a technical or strained interpretation. <sup>260</sup> They should receive their ordinary interpretation. To repair, as it is ordinarily used, means to amend, not to make a new thing, but to refit, to make good or restore an existing thing: See *Todd v. Rowley*, 8 Allen, 51; *Stephens v. Milnor*, 24 N. J. Eq. 358. When we speak of repairing a thing, the very expression presupposes something in existence to be repaired. If a carpenter contracts to repair a house, or a mason a chimney, the ordinary construction of these contracts would not be that these parties had agreed to build a new house or a new chimney. If the construction of the lessee's covenant contended for by the appellee here be correct, then had this entire tract of land and its buildings been swept away by a flood of the Missouri river, the lessee would be liable for their value to the lessor. Before we can say that a lessee assumed the liability of any such a contingency as that supposed, we must find his assumption of such a risk in the clear and express language of his contract.

In *Pollard v. Shaffer*, 1 Dall. 210, 1 Am. Dec. 239, the lessee covenanted to pay rent and deliver up the premises in good repair. The lessor sued for a failure of the covenant to keep in good repair. The lessee pleaded that an alien enemy—the British army—invaded the city of Philadelphia, took possession of the leased premises, and committed the destruction made the subject of the lessor's action. The question was, whether the special matter pleaded was a defense. The supreme court of Pennsylvania held that it was. In that case, as in the case at bar, it was insisted that the covenant of the lessee to keep the demised premises in repair bound him to restore the buildings if destroyed



The court said: "I am of opinion that the defendant is excused from his covenant to deliver up the premises in good repair: 1. Because a covenant to do this against an act of God or an enemy ought to be special and express, and so clear that no other meaning could be put upon it; 2. Because the defendant had no consideration, no premium for this risk, and it <sup>261</sup> was not in the contemplation of either party. . . . Suppose when the lease was executed that the lessee had been asked, 'Is it your meaning that in case the buildings shall be destroyed by an act of God or public enemies you are to rebuild or repair them?' His answer would have been, unquestionably, 'No, I never entertained such an idea.' Should the like question have been put to the lessor, his answer would certainly have been 'No, I did not expect anything so unreasonable.'"

In *Levey v. Dyess*, 51 Miss. 501, it was held that, in the absence of covenants by the lessee amounting to express covenants to rebuild structures destroyed by casualty, or by proof of negligence by the lessee, the loss is on the landlord.

In *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, the lessee covenanted that at the expiration of the lease he would surrender the premises in as good order and condition as they were when he accepted them, usual wear and tear excepted, and it was held that this covenant did not include an agreement on the part of the lessee to rebuild the structures on the premises destroyed by fire. To the same effect see *Howeth v. Anderson*, 25 Tex. 557; 78 Am. Dec. 538. In that case the court said: "Leases are construed like other written agreements, so as to give effect to the intention of the parties." To the same effect: *Warner v. Hitchins*, 5 Barb. 666. In that case, the covenant of the lessee was to surrender possession of the leased premises at the expiration of the term in the same condition they were in at the commencement of the lease, natural wear and tear excepted. The leased buildings were destroyed by fire, and it was insisted in behalf of the lessor that the covenants of the lessee included a covenant to rebuild. But the court said that, in order to hold the lessee liable for the value of the destroyed buildings, he must have expressly agreed to rebuild them or restore them.

In *Wainscott v. Silvers*, 13 Ind. 497, the covenant of the lessee was, at the expiration of the term, to surrender the leased premises in as good condition as when they <sup>262</sup> were received. The court said: "The law, as between landlord and tenant, we understand to be that the tenant is not responsible for buildings accidentally

burned down during his tenancy, unless he has expressly covenanted or agreed to repair. It is not sufficient to charge him that he agreed . . . to surrender the premises at the end of his term in the same repair or condition they were in at the time of the contract."

We reach the conclusion that an express agreement of a lessee to keep in good repair leased premises, and at the expiration of the term surrender their possession in as good condition as they were when he entered, natural decay, wear, and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.

2. The lessor in this case is under no obligation to rebuild the destroyed buildings during the term, for the simple reason that he has not contracted so to do: *Turner v. Townsend*, 42 Neb. 376.

3. By the lease under consideration the premises were let to the lessee for a specified term, in consideration of which he covenanted to pay to the lessor a specific sum as rent, payable in installments on certain dates during the term. The lease contained no provision binding the lessor to rebuild. The lease contained no provision for any abatement of the rent promised, for any reason whatsoever. The question presented is: A substantial part of the leased premises having been destroyed without the fault of either lessor or lessee, is the latter entitled to an apportionment of the rent accruing thereafter? The common-law construction of such a covenant as this would not relieve the tenant from payment of the entire rent reserved. The old English case of *Paradine v. Jane*, Aleyn, 26, was a suit on a covenant to pay rent. The lessee defended the action on the ground that during the civil wars of England, Prince Rupert, an alien born, with a hostile army, had driven him out of possession of the premises. But the court decided that although the whole <sup>263</sup> army had been alien born enemies, the lessee was still bound to pay the entire rent reserved, because he had expressly covenanted so to do. This construction of the covenant to pay rent has been very generally followed in the United States: See the rule stated and the authorities collated in 12 Am. & Eng. Ency. of Law, 741. In 1787, the question was presented to the supreme court of Pennsylvania in *Pollard v. Shaffer*, 1 Dall. 210; 1 Am. Dec. 239. In that case, the lessee defended against an action for rent upon the ground that he had been deprived of the use of the premises by an alien enemy, namely, the British army. But the court followed the

common-law rule announced in *Paradine v. Jane*, Aleyn, 26, and held the lessee liable for the entire rent reserved. The principle upon which the court based its decision was: 1. That the covenant to pay the rent was express; and 2. That since, by the lease, the lessee was to have the advantage of casual profits of the leased premises, he should run the hazard of casual losses during the term. The question was presented to the supreme court of Massachusetts in 1809, in *Fowler v. Bott*, 6 Mass. 62. The lease in that case was for a mill, and it was destroyed by fire during the term. The court followed the common-law rule, and held that the lessee was liable for the entire rent reserved. In that case, the court seems to have based its decision upon the ground that the lease amounted to a bargain and sale of the leased premises for the term. The common-law rule of construction quoted above was also followed in *Fowler v. Payne*, 49 Miss. 42, *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465, *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306, *Lanpher v. Glenn*, 37 Minn. 4, and in many other cases not necessary to cite here. Chancellor Kent, discussing the question under consideration, says: "It is well settled that upon an express contract to pay rent the loss of the premises by fire or inundation, or external violence, will not exempt the party from his obligation": 3 Kent's Commentaries, 13th ed., sec. 466. The rule announced in *Paradine v. Jane*, Aleyn, 26, has been abolished by statute in the <sup>264</sup> state of New York, and perhaps some other states, and the courts of last resort in the states of Kansas and South Carolina have declined to follow the rule, but, with these exceptions, we think it may be safely said that in every other state where the rule has been presented for consideration to the court of last resort it has been followed. In 1832, the supreme court of Ohio announced an exception to this rule. In that case, the leased premises consisted of a cellar or basement in a building several stories high. The entire building was destroyed by fire, without the fault of the lessee, and the lease contained no covenant on the part of the lessor to rebuild, and the court held that the destruction of the leased premises terminated the relation of landlord and tenant. This case was followed and the exception sustained in *Stockwell v. Hunter*, 11 Met. 448; 45 Am. Dec. 220; *Graves v. Berdan*, 26 N. Y. 498; *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465; *Ainsworth v. Ritt*, 38 Cal. 89; *McMillan v. Solomon*, 42 Ala. 356; 94 Am. Dec. 654. Indeed, the exception to the rule seems to be about as well established in the United States as the rule itself. In some of



the cases following the rule, the reasons for its existence are said to be that it is only equitable that the lessee should pay the entire rent notwithstanding a destruction of a part of the leased premises, since the lessor must bear the loss of the destroyed property; and that the enforcement of the rule tends to diminish the carelessness and increase the vigilance of a lessee. We do not know what reason led to the formulation of this rule, but, if the one quoted above is the correct one, it is of no force at the present time, because the lessor may protect his interest in the property while in the hands of the lessee by insurance. The reason given for the formulation of the exception to the rule is, that by a lease of a room or basement in a building no interest in the soil passes to the lessee, and that when the basement or room is destroyed the leased estate is gone and the relation of landlord and tenant terminated. But it seems to us that another principle underlies and controls the exception, <sup>265</sup> and that is this: That the leased room or building having been destroyed without the fault of the lessee, the consideration for his promise to pay the rent accruing thereafter failed. The common-law rule announced in *Paradine v. Jane*, *Aleyn*, 26, is merely a rule of construction of a real estate contract.

We have already seen to what extent the common law is in force in this state and have noted the command of the legislature to the courts of this state in construing real estate contracts to look to the subject matter of the contract, the language employed by the contracting parties, and to ascertain if possible, and give effect to, the intention of the contracting parties. A lease for real estate is not a bargain and sale for a given time of the lessor's interest in the leased premises. It is rather a hiring or letting of property for a certain time and for a named consideration; and, when a lessee covenants to pay rent for a term, the consideration for that covenant is his right to the use and occupancy of the thing leased. In the covenant of a lessee to pay at stated times certain sums of money for the rent—that is, for the privilege or the right to use and occupy the leased premises—is involved the condition that such leased property shall be in existence and be capable of being used and enjoyed by the lessee. The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term. In the case at bar, if the lessee had been evicted from part of the demised premises by the holder of a title paramount to that of the lessor's,

the lessee would be entitled to an apportionment of the rent: Taylor on Landlord and Tenant, sec. 387, and cases there cited. Under the exception established to the rule, had the entire leased premises been washed away by a flood, the relation of landlord and tenant existing between the parties to this suit would have from that moment ceased. This relation would not have been terminated by the act of the parties, but by operation of law, and the lessee would have been <sup>266</sup> relieved from the payment of rent accruing thereafter, upon the principle that the consideration for his promise to pay such rent had failed. If we look to the subject matter of the lease under consideration and the language employed by the parties in making the contract, we cannot say that either of these parties, at the time they made this lease, had in contemplation the fact that the leased premises, or any part thereof, might be destroyed by a hurricane. They did not contract with reference to such a casualty. To use the language of McKean, C. J., in Pollard v. Shaffer, 1 Dall. 210, 1 Am. Dec. 239, had the lessor been asked at the time this lease was made, "Is it your intention to hold the lessee liable for the entire rent reserved in case the leased buildings shall be destroyed by a cyclone?" he doubtless would have answered that he had never considered that contingency. If the question had been asked the lessee whether it was his intention to pay the entire six thousand dollars rent, even if one-half of the leased property should be destroyed before the expiration of the term, it is very probable that he would have said that he had no such an intention. Yet in construing this contract we must, if possible, give effect to the intention of the parties, notwithstanding the common-law rule of construction. To us it seems that the lessor, in effect said to the lessee: "I own this tract of land and these ice-houses; they are in good repair; they are fit for the purposes of harvesting and storing ice; I will hire them to you for five years if you will pay me twelve hundred dollars per year and keep the premises in good repair." To this the lessee assented. This was an offer and a promise upon the part of the lessor to furnish for the entire time the hired property; it was a promise and a covenant upon the part of the lessee to pay the monthly installments of rent for the right to use and occupy the hired property if it existed. But it was not a proposition on the part of the lessor to quitclaim his right to the use and occupancy of the leased premises to the lessee for five years in consideration of six thousand dollars paid, or to be paid by the latter. This rule of construction of the <sup>267</sup> common law is a harsh and a technical one.

We do not certainly know the conditions that existed when it was formulated, nor do we know in what reasons it had its origin, but we do know that since the decision of *Paradine v. Jane*, Aleyn, 26, the conditions of the race have changed; its conscience and intellect have been quickened, and this rule, however meritorious it may have been at the time and place of its origin, is opposed to the genius and spirit of the present age and in conflict with its judgment and conscience. In one or two instances, in states where its effect has not been even limited by statute, its applicability to real estate contracts in this country has been questioned. Such was the case of *Ripley v. Wightman*, 4 McCord, 447, where it was held that the fact that a house had been rendered untenable by a hurricane afforded the lessee a defense to the action for the rent. In *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, the buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the court held that because of the accidental destruction by fire of the buildings upon the leased premises the lessee was entitled to an apportionment of the rent. In that case Brewer, J., speaking for the court, said: "And right here it may be remarked that a lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant rather than a purchase single and completed of a term or estate in lands." We are aware that this case stands practically alone, and in a footnote to *McMillan v. Solomon*, 94 Am. Dec. 654, its isolation is pointed out with a remark by the editor that it is supported by "much charity and some logic." We approve of the opinion because we think it is good law as well as good sense. We approve of it also because it is a magnificent protest against slavish devotion to antiquated rules; and we approve of it because it breathes the spirit of humanity and equity and is based on a thought of the nineteenth century. We reach the conclusion that the common-law rule <sup>268</sup> of construction under consideration is not in force in this state and formulate the rule as follows: Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. The decree appealed from is reversed and the cause remanded, with instructions to the district court to enter a decree in accordance with this opinion.



IN A DISSENTING OPINION written by Commissioner Irvine and concurred in by the chief justice and Commissioner Ryan they agreed that the covenant to repair did not impose the duty on the lessee to restore a building destroyed without his fault, but denied that such destruction did not entitle him to an apportionment of the rents agreed to be paid. They insisted that it was admitted that, with the exception of *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, such apportionment was not supported by any authority; that, on the other hand, the rule was well settled that the liability of a tenant for the whole rent continued if he remained in possession of the premises under his lease, and, if he wished to be relieved from such liability, his remedy, on the destruction of a substantial portion thereof, was to rescind the lease and surrender possession to his landlord, as decided in *Coogan v. Parker*, 2 S. C. 255; 16 Am. Rep. 659.

**Landlord and Tenant—Rights and Liabilities of Tenant upon Destruction of Leased Buildings.\***

*Repairs, Duty to Rebuild.*—Generally, in the absence of an express covenant on the subject, the law implies a covenant on the part of the lessee to treat the demised premises in such manner that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any willful or negligent act of the lessee; but this implied covenant does not extend to the loss of buildings on the demised premises by fire, flood, tempest, or enemies, which it is not within the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore or rebuild the buildings thus destroyed, or destroyed by accident without his fault; *United States v. Bostwick*, 94 U. S. 53; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Long v. Fitzsimmons*, 1 Watts & S. 530; *Earle v. Arbogast*, 180 Pa. St. 409.

It is undoubtedly a rule which existed under the common law that where a lessee covenanted generally to keep the demised premises in repair and at the end of the term surrender them in as good condition as they were at the date of the lease, he was bound to make repairs under all circumstances and to rebuild in case of the destruction of buildings on the leased premises, even though such injury proceeded from an act of God, from the elements, or from the act of a stranger, and if he desired to relieve himself from liability for injuries resulting from any such cause or any cause whatever, he must except them by stipulation from the operation of his covenant. Several of the states of the United States have adopted this common-law rule. Among them, *Polack v. Pioche*, 35 Cal. 416; 95 Am. Dec. 115; *Phillips v. Stevens*, 16 Mass. 238; *Priest v. Foster*, 69 Vt. 417; *David v. Ryan*, 47 Iowa, 642; *Ely v. Ely*, 80 Ill. 532; *Beach v. Crain*, 2 N. Y. 86; 49 Am. Dec. 369; *Hoy v. Holt*, 91 Pa. St. 88; 36 Am. Rep. 659; *Armstrong v. Maybee*, 17 Wash. 24; post, p. 897. Under such a covenant, the tenant is bound to rebuild on the demised premises structures destroyed by fire or other accident during the term,

\* REFERENCES TO MONOGRAPHIC NOTES.

Apportionment of rent on partial destruction of rented premises: 37 Am. Rep. 283, 284.

Covenants to repair and liabilities thereunder: 95 Am. Dec. 118-125.

Effect of destruction of leasehold property: 94 Am. Dec. 662-665.

though without his fault: Phillips v. Stevens, 16 Mass. 238; Priest v. Foster, 69 Vt. 417; David v. Ryan, 47 Iowa, 642; Ely v. Ely, 80 Ill. 532; Hoy v. Holt, 91 Pa. St. 88; 36 Am. Rep. 659. In one case, it was held that under a general covenant to repair, the tenant was compelled to repair and rebuild, though the loss was caused from the overflow from a natural reservoir, filled with water from unusual rains, the banks of the reservoir having been broken by a stranger and the lease exempting liability for "damages by the elements or acts of Providence," and it was also held in this case that the acts of Providence referred to, are in a legal sense only those which do not happen through human agency, as storms, lightnings, and tempests: Polack v. Pioche, 35 Cal. 416; 95 Am. Dec. 115. A majority of the cases, however, have repudiated the common-law rule referred to above, and have adopted another and better one, namely, that a covenant by the lessee to restore the premises in as good condition as when delivered to him, ordinary wear and tear excepted, does not bind him to rebuild in case of destruction of buildings on the demised premises by fire or other accident occurring without his fault, nor does such destruction render him liable for the loss: Miller v. Morris, 55 Tex. 412; 40 Am. Rep. 814; Howeth v. Anderson, 25 Tex. 557; 78 Am. Dec. 538; Warren v. Wagner, 75 Ala. 188; 51 Am. Rep. 446; Van Wormer v. Crane, 51 Mich. 363; 47 Am. Rep. 582; Whitaker v. Hawley, 25 Kan. 674; 37 Am. Rep. 277; Levey v. Dyess, 51 Miss. 501; Pollard v. Shaffer, 1 Dall. 210; 1 Am. Dec. 239; Warner v. Hutchins, 5 Barb. 666; Wainscott v. Silvers, 13 Ind. 497. In speaking on this subject, the court, in Levey v. Dyess, 51 Miss. 569, said: "We deduce these principles from the authorities: First, that the lessee is not responsible to the lessor for the accidental, casual destruction by fire of the property demised, unless by his covenant he has made himself so. In construing covenants, the cardinal rule is the intention of the parties, and the courts will not extend or enlarge the obligations of the lessee for such losses beyond the plain meaning and intention of the parties. If there is not an express stipulation to rebuild or restore edifices and structures destroyed by casualty, or some covenant which is equivalent thereto, the loss must fall upon the reversioner and not upon the lessee. And, lastly, a covenant to redeliver or restore to the lessor in the same plight or condition, usual wear and tear excepted, or other words of like import, does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss on him": Levey v. Dyess, 51 Miss. 509. If a foreign foe invades the property and destroys it the lessor is not compelled to rebuild, although he has covenanted to repair and to deliver the premises in good order and repair: Pollard v. Shaffer, 1 Dall. 210; 1 Am. Dec. 239.

*Rent.*—The rule is well supported by authority that upon the total or partial destruction of the buildings upon the leased premises during the term, by fire or other unavoidable accident, the lessee, under an express promise or covenant, remains liable to pay rent for the whole term, unless there is a stipulation relieving him from the payment of rent after such destruction, or the lessor has covenanted to rebuild or repair: Pollard v. Shaffer, 1 Dall. 210; 1 Am. Dec. 239; Hallett v. Wylie, 3 Johns. 44; 3 Am. Dec. 457; Gates v. Green, 4

Paige, 355; 27 Am. Dec. 68; Lynn v. Ross, 10 Ohio, 412; 36 Am. Dec. 95; Womack v. McQuarry, 28 Ind. 103; 92 Am. Dec. 306; Barrett v. Boddie, 158 Ill. 479; 49 Am. St. Rep. 172; Smith v. McLean, 123 Ill. 210; Helburn v. Mofford, 7 Bush, 169; Fowler v. Payne, 49 Miss. 32; Fowler v. Bott, 6 Mass. 63; Harrington v. Watson, 11 Or. 143; 50 Am. Rep. 465; Warren v. Wagner, 75 Ala. 188; 51 Am. Rep. 446. In an action upon an express covenant in a lease for the payment of rent, without conditions, a plea that the lessee was deprived of the beneficial use of the premises by its destruction through the casualties and violence of war is not a good defense. The loss of the use of the premises by fire, inundation, or external violence does not relieve the tenant from his express contract to pay rent: Robinson v. L'Engle, 13 Fla. 482. Under a lease of a building with an express covenant to pay rent, the destruction of the building by fire, although the lessor may have received the insurance money, does not relieve the lessee from the payment of rent for the entire term: Bussman v. Ganster, 72 Pa. St. 285. If the lessee of ground owns a wooden building thereon, which is destroyed by fire during the term, and, at the date of the lease, the city wherein such building was situated had passed a fire limit ordinance, by which the lessee is prohibited from erecting another wooden building on the land, he is still liable to pay rent to the end of the term: Harris v. Heackman, 62 Iowa, 411. In case of a lease with covenants on the part of the lessor to pay rent and on the part of the lessor to repair, a refusal by the lessor to rebuild upon the destruction of the demised premises during the term excuses the lessee from the payment of rent, or, entitles him to such other relief as the circumstances may warrant: Fowler v. Payne, 49 Miss. 32. The lessee of premises partially destroyed during the term by fire or unavoidable accident is not relieved from an express covenant to pay rent, unless he protects himself by a stipulation that the rent shall cease in such event, or unless the lessor covenants to rebuild or repair: Cook v. Anderson, 85 Ala. 99; Warren v. Wagner, 75 Ala. 188; 51 Am. Rep. 446. It has been held that the tenant continues liable for rent of the premises injured by fire so long as any part thereof remains in existence capable of being occupied or enjoyed by him. This is the general rule, but it has been so modified by statute in New York as to give the tenant the option of surrendering possession of premises destroyed by fire and declaring his lease at an end, thus exempting himself from liability for further rent. He continues liable under his lease, however, until he exercises his option and effects a full and absolute surrender of the premises: Smith v. Kerr, 108 N. Y. 31; 2 Am. St. Rep. 362. The New York rule stated above applies to lessees of buildings which are totally destroyed by the elements, or injured so as to be untenable: Fleichman v. Topplitz, 134 N. Y. 349; New York Real Estate etc. Co. v. Motley, 143 N. Y. 156.

Under this rule, notice to the landlord from the tenant of his intention to surrender is not necessary to terminate liability for rent. He is simply required to surrender as soon as reasonable under the circumstances: Fleichman v. Topplitz, 134 N. Y. 349. In the absence of an express stipulation, a lessee cannot claim a pro rata return of rent paid in advance, on account of a partial destruction of



the leased buildings by fire during the term, and when a stipulation for a pro rata return of the rent paid is inserted in the lease it is for the benefit of the tenant, and is waived by him, if he continues in possession after the fire, using the remaining buildings for the purpose contemplated by the lease; nor is it necessary that the lessor, before he can claim that such stipulation has been waived, should have demanded the surrender of the premises: *Chamberlain v. Godfrey*, 50 Ala. 530. The rule that upon the destruction, or partial destruction, of buildings on the leased premises the tenant remains liable for rent during the term in the absence of express stipulation to the contrary, as well as the reason for such rule, are thus clearly stated by Mr. Justice Brickell in delivering the opinion in *Chamberlain v. Godfrey*, 50 Ala. 533: "A lessee of premises destroyed during the term by inevitable accident, the violence of nature, or the act of a public enemy, has no relief against the express covenant or promise to pay rent, either in law or equity, unless he protects himself by a stipulation in the lease or the landlord covenants to rebuild. The reason of the rule usually assigned is, that the lessee by his own contract creates the charge upon himself, and, if no fault be imputable to the landlord he should be compelled to bear it, as he could, if he had chosen, have relieved himself by a stipulation for the cessation of rent in the event of such destruction. Considerations of public policy seem, also, to have entered into the adoption of the rule. Such destruction may result from the carelessness of the lessee, and it may not be possible for the lessor to offer evidence of it. Holding the tenant to liability for rent removes temptation to negligence, and keeps alive the diligence he should observe in protecting and preserving the premises. A limitation of this rule is that the destruction must not be of the entire premises leased. There must be something of the subject matter of the lease remaining. Its value may be diminished. It may be incapable of rendering to the tenant the benefit he expected to derive from its use and occupation. The tenant is, nevertheless, bound to pay the rent so long as the thing demised is capable of holding under the lease, so long as the estate of the landlord, out of which the term is carved, remains": *Chamberlain v. Godfrey*, 50 Ala. 534. In other words, "Where a lessee takes an interest in the soil upon which a building stands, and the building should be destroyed by fire, he will be held for the rent of the entire property, unless he stipulates against casualties": *Buerger v. Boyd*, 25 Ark. 441. If the title of both the landlord and tenant is extinguished in the whole demised premises during the term by condemnation proceedings for a public use, the liability of the tenant to pay rent also ceases, and, in any action brought by the landlord for the rent accrued after the termination of his estate, the tenant may plead such termination in defense, but when a portion of the demised premises only is thus taken, and a part remains which is susceptible of occupation under the lease, the covenants of the lease are not abrogated, and the tenant is bound to pay rent according to the covenants in the lease, and is not entitled to any apportionment or abatement of the rent for the part of the premises taken, but is bound to pay rent for the whole: *Corrigan v. Chicago*,

144 Ill. 537; *Stubblins v. Evanston*, 136 Ill. 37; 29 Am. St. Rep. 300; *Parks v. Boston*, 15 Pick. 198; *O'Brien v. Ball*, 119 Mass. 28; *Barclay v. Picker*, 38 Mo. 143. A contrary rule was laid down in *Foot v. Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737, where the whole of the demised premises were appropriated for street purposes and the tenant was held liable for the rent for the whole term.

*Abatement or Apportionment of Rent* may be provided for by a tenant by stipulation in the lease, provided the demised buildings are accidentally destroyed without fault on his part. Thus, if the lease states that the rent for the term has been paid in advance, and that, "in case the premises shall be destroyed by fire during the term, the rent hereinbefore reserved, or a just and proportionate part thereof, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of said lessor," and during the term the building on the demised premises is destroyed by fire, and the lessor elects not to rebuild, the lessee is entitled to recover back a proportionate part of the rent paid in advance: *Rich v. Smith*, 121 Mass. 328. As before mentioned, the tenant by statute in New York is given the option of surrendering possession of the leased premises if the buildings thereon are destroyed by fire, and of declaring his lease at an end, thus relieving himself from liability to pay rent, but he continues liable therefor until he exercises his option and surrenders possession of the premises: *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Fleishman v. Topplitz*, 134 N. Y. 349; *Johnson v. Oppenheim*, 12 Abb. Pr. N. S., 449. Under the Louisiana statute, if buildings on a portion of the demised premises are destroyed by fire, the lessee has the option to demand a revocation of the entire lease or a diminution, pro tanto, of the rent, but he cannot retain the portion of the leased property unaffected by the fire and have the lease revoked as to the part destroyed: *Penn v. Kearney*, 21 La. Ann. 21.

The common-law doctrine that the tenant remains liable for rent for the term upon the destruction of the buildings upon the leased premises has been repudiated in South Carolina, where the true doctrine has been announced to be that where there is a substantial destruction of the buildings upon leased premises out of which rent has been reserved in a lease for a term of years, by the act of God, the public enemy, or other unavoidable accident, the tenant may elect to rescind, and on surrendering possession under the lease, and all benefits thereunder, shall be discharged from the payment of further rent. If the tenant be deprived of the beneficial enjoyment of the leased premises according to the intent of the lease, this is a destruction of the subject matter thereof within the meaning of this rule, whether there is a physical destruction of the premises or not: *Coogan v. Parker*, 2 S. C. 255; 16 Am. Rep. 659; *Bayly v. Lawrence*, 1 Bay, 499; *Ripley v. Wightman*, 4 McCord, 447. A similar doctrine prevails in Kansas, where it has been held that under a lease of real property and the personalty thereon for a gross rental, and where the personalty is the substantial part of the leased property, upon its accidental destruction by fire, the lessee is entitled to an abatement of the rent equal to the proportionate rental value of the

personalty: *Whitaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277. The doctrine of *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, and of *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659, is heartily approved in *Taylor v. Hart*, 73 Miss. 22, although the latter case was decided under a statute. In this last case it was held that the lessee of land, the rental value of which materially depended upon the use of the buildings thereon, was entitled to an abatement of the annual rent of the premises upon the destruction of such buildings during the term by accidental fire. The statute governing the case provided that: "A tenant shall not be bound to pay rent for buildings after their destruction by fire, or otherwise, without negligence or fault on his part, unless he has expressly stipulated to be bound": *Taylor v. Hart*, 73 Miss. 22. In delivering the opinion in this case, Mr. Justice Whitfield referred to the opinion of Mr. Justice Brown in *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, as "an opinion of great learning and power, exposing the absurdities of the common-law rule on this general subject especially as applied to the conditions of society existing with us," and Judge Whitfield further said: "The clear tendency of all the modern decisions in our states has been to so modify the rule of the common law as to work out a result just and equitable in the situation, and it is well said by Mr. Justice Brown in the case cited that, 'the clear tendency of the rulings has been to do away with common-law technicalities concerning real estate, and to bring the rules of the common law more in harmony with those respecting personal property,' and that 'the distinctions growing out of the feudal system are disappearing, and this distinction between the lease of real property and the hiring of chattels is one which, sooner or later, will cease to exist.' In the same spirit is *Coogan v. Parker*, 2 S. C. 255; 16 Am. Rep. 659"; *Taylor v. Hart*, 73 Miss. 31.

*Apartments.*—To the rule maintained by many of the authorities, that where the lessee takes an interest under his lease in the soil upon which the leased building stands, he is still liable for the rent for the term, even though the building is destroyed by fire or other inevitable accident, unless he protects himself by stipulation, there is a well-defined exception, upon which the authorities are uniform, and it is this, that when one leases an upper story or the basement only of a building or a room, or apartments therein, and the building is destroyed by fire or other unavoidable casualty, he is thereby relieved from the further payment of rent: *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465; *Stockwell v. Hunter*, 11 Met. 448; 45 Am. Dec. 220; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125-128; *Buerger v. Boyd*, 25 Ark. 441; *Austin v. Field*, 7 Abb. Pr., N. S., 34; *Kerr v. Merchants' Exchange*, 3 Edw. Ch. 316; *Graves v. Berdau*, 26 N. Y. 498; *Winton v. Cornish*, 5 Ohio, 477; *Womack v. McQuarry*, 28 Ind. 103; 92 Am. Dec. 306; *McMillan v. Solomon*, 42 Ala. 356; 94 Am. Dec. 654; *Ainsworth v. Ritt*, 38 Cal. 89; *Whitaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277. This rule has been said to be "founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and that when that enjoyment becomes impossible by reason of the destruction of the building, there remains nothing upon which the demise can operate," and liability



for rent thereupon terminates: *Womack v. McQuarry*, 28 Ind. 103; 92 Am. Dec. 306; *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465. In *Kerr v. Merchants' Exchange*, 3 Edw. Ch. 316, the vice-chancellor said: "So, in the present case, the leases are not to be considered leases of land, but of apartments in the building, distinct from the land on which it was erected. Leases must be construed according to the intention of the parties, and with reference to the subject matter, which, in this instance, were rooms or apartments in the building designated by certain numbers. I think it follows that, with the destruction of the premises which were demised, namely, the apartments in the building, the lease itself and the rights and interests under it terminated." Again in *Ainsworth v. Ritt*, 38 Cal. 89, it was said: "The lease, as between plaintiff and defendant, was of a portion of the building or superstructure, and not of the land upon which the same rested. Hence a destruction of the house, the subject matter of the lease, in the absence of covenants to repair, terminated the lease and the relation of landlord and tenant, and no action can be maintained by the plaintiff for rent accruing subsequent to the destruction of the building and consequent termination of the lease": *Ainsworth v. Ritt*, 38 Cal. 90. Where a sawmill and a room in an adjoining factory are leased to the same person by the same instrument for an entire rent, and both buildings are accidentally destroyed by fire, the lessee is still liable for the rent of the sawmill, but is released from liability for the rent of the room, and the rent must be apportioned as in the case of a partial eviction of a tenant by title paramount: *Womack v. McQuarry*, 28 Ind. 103; 92 Am. Dec. 306. Accruing rent ceases upon the destruction by fire of leased apartments in a building in a city for the purposes of trade, and the landlord has a right to recover only the rent proportionate to the period of the term antecedent to the fire: *McMillan v. Solomon*, 42 Ala. 356; 94 Am. Dec. 654. A tenant in possession of a certain portion of a building under a lease, for which he pays a monthly rental in advance, is entitled to recover the amount paid for that part of the month remaining after the total destruction of the premises by fire or otherwise: *Porter v. Tull*, 6 Wash. 408; 36 Am. St. Rep. 172. If leased rooms in a building are not totally destroyed, but only damaged by fire, and remain in such condition that the tenant may still occupy them and repair and restore them to their former condition, he is not relieved from the payment of rent: *Smith v. McLean*, 123 Ill. 210. If a lease of rooms in a building stipulates that, in case the premises are damaged by fire, no rent shall be paid while they are unfit for occupation, and the lease further provides that the lessee shall deliver the premises at the end of the term in as good condition as when received, loss by fire excepted, then in case of damage to the premises by fire the landlord must repair, but such damage does not terminate the lease, although it does stop the rent while the rooms remain unfit for occupation. In such case, the landlord has the right to enter to make repairs, if made within a reasonable time, and thereafter the tenant must pay rent: *Smith v. McLean*, 123 Ill. 211; *Hoeveler v. Fleming*, 91 Pa. St. 322.

## CAMPBELL PRINTING PRESS AND MANUFACTURING COMPANY v. MARDER, LUSE & CO.

[50 NEBRASKA, 283.]

**AN OFFICER'S RETURN OF THE SERVICE OF PROCESS** can be impeached collaterally.

**JUDGMENTS—JURISDICTION, DEFECTS IN SERVICE OF PROCESS.**—If an attempt at service is made and actually reaches the defendant, although it be not made or returned in the form required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack.

**JUDGMENT AGAINST CORPORATION, WHEN VOID.**—If service of process against a corporation is not made on any person having any connection with it, such service cannot support against collateral attack a judgment based thereon.

**JUDGMENTS, VOID.**—One seeking any kind of affirmative relief must fail, if he bases his claim on a void judgment.

**CORPORATIONS, PREFERENCES OF DIRECTORS.**—A corporation may not prefer a debt owing to its own directors, or for the payment of which they are sureties.

**CORPORATIONS, PREFERENCES BY.**—If one corporation becomes the holder of the stock of another, the officers of the former, acting in its behalf and also on behalf of the latter, cannot prefer a debt due from the latter to the former, especially where the preference absorbs all the assets of the debtor corporation.

Connell & Ives, for the appellant.

Breckenridge & Breckenridge and L. F. Crofoot, contra.

**285** **IRVINE, C.** The Campbell Printing Press & Manufacturing Company, a New York corporation, brought this action against Marder, Luse & Co., which seems to be an Illinois corporation, and the Omaha Type Foundry, a Nebraska corporation, alleging in its petition the recovery by the plaintiff against the Omaha Type Foundry of four judgments before a justice of the peace, and one in the county court of Douglas county; and that executions issued on these judgments had been returned unsatisfied; that such judgments were upon promissory notes made by strangers to the type foundry and by it indorsed to the plaintiff; that at the time of the indorsement of said notes the type foundry had in its possession and was the owner of a large amount of property; that Marder, Luse & Co. was then the owner of a large portion of the capital stock of the type foundry, and thereafter became the owner of the rest of the stock, and thereupon took possession and appropriated to its own use all the property of the type foundry. The prayer was for a disclosure of the property of the type foundry and that it be applied to the payment of

plaintiff's judgments and for judgment against Marder, Luse & Co. Marder, Luse & Co. answered denying the material averments of the petition and alleging that the type foundry, in February, 1891, became unable to continue its business because of inability to pay debts, and sold its property to Marder, Luse & Co., the latter paying full consideration therefor. The court found for the plaintiff, taking the view that the plaintiff was entitled to share pro rata with other creditors in the property of the type foundry, and rendered judgment against Marder, Luse & Co. for that proportion of its judgment <sup>208</sup> corresponding to the ratio which the value of the property bore to the total indebtedness of the company. From this decree Marder, Luse & Co. appeals.

The evidence, without contradiction, discloses that prior to December, 1890, the type foundry was doing business in Omaha with a capital stock of twenty-five thousand dollars, twenty-three thousand dollars of which was owned by Marder, Luse & Co., one thousand dollars by Mr. Pickering, and one thousand dollars by H. P. Hallock. Mr. Hallock was vice-president of the company, Mr. Marder, of Marder, Luse & Co., being its president. In December, 1890, Marder, Luse & Co. purchased the stock of Messrs. Pickering and Hallock, and thus became the sole owner of the stock of the type foundry. Mr. Dresser appeared then as the agent of Marder, Luse & Co., and took possession of the property of the type foundry. It appears quite clearly that he held no official position in the type foundry corporation and exercised no authority derived therefrom. The type foundry had about this time executed a bill of sale to Marder, Luse & Co. of all its property in payment of an indebtedness previously incurred. This bill of sale was authorized at a meeting of the stockholders of the type foundry, the minutes disclosing that Mr. Marder was alone present representing all the stock. From that time, to wit, early in February, 1891, the property was in the possession of Dresser as agent for Marder, Luse & Co. under the bill of sale. The judgments were all rendered in actions begun in 1892, long after the transactions referred to. To their introduction in evidence the defendant objected, on the ground of want of jurisdiction appearing on the face of the record, and also by extrinsic evidence. The court received the judgments and found in the decree that they were valid. We think they were shown beyond dispute to be void. It is unnecessary to consider some of the questions argued as to the validity of service upon certain offi-



cers of the corporation. Where the returns show by name the person upon whom service was made, it appears in each case to be Mr. Hallock or Mr. Dresser. At the time of service Mr. Hallock had no <sup>287</sup> connection whatever with the corporation, and Mr. Dresser never had any connection therewith. One record discloses service by leaving a copy at the usual place of business of the corporation. But the action was before a justice of the peace. The general provision of the Code of Civil Procedure is (sec. 73), that a summons against a corporation may be served upon certain officers named, "or if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation." But section 912 of the code is a special provision relating to service upon corporations in actions before justices of the peace, and such special provision prevails as against the general provision of section 73. By section 912 it is provided that a summons may be served upon certain officers, "or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation with the person having charge thereof." Now, at the time this summons was served, the type foundry had no usual place of business, and no person was in charge thereof. The section governing the case differs from section 73 in requiring service at the usual place of business instead of last usual place of business, and in requiring a copy to be left with the person having charge thereof. While it was held in *Johnson v. Jones*, 2 Neb. 126, that the return of an officer cannot be impeached collaterally, it has since been several times distinctly held to the contrary: *Holliday v. Brown*, 33 Neb. 657; 34 Neb. 232; *Wilson v. Shipman*, 34 Neb. 573; 33 Am. St. Rep. 660. In many other cases, the court, by considering the sufficiency of evidence to impeach the return, has impliedly held to the same effect, and it now must be accepted as the established law of this state that extrinsic evidence is admissible in a collateral proceeding for the purpose of impeaching an officer's return. We call attention to this rule for the purpose of showing the inapplicability of certain authorities from states holding otherwise, which authorities are relied on by the appellee.

The appellee contends, however, that although it be <sup>288</sup> found that the service was defective, the judgments are not void, and not open to collateral attack. In support of this argument reliance is placed largely on *Gandy v. Jolly*, 35 Neb. 711; 37 Am. St. Rep. 460. In that case, the defect was that the service had been

by reading the summons instead of delivering a copy. This was a mere irregularity in the manner of service, and the court properly held that it did not render the judgment void. A paragraph from Black on Judgments, was, however, cited with approval in the opinion, distinguishing between such irregularities in the manner of service and a total want of service which renders the judgment void, and as illustrations of cases where there is a total want of service there is mentioned service by delivering a copy to a third person not a resident of the house of defendant's abode, and service upon a stranger, although he is the authorized agent of the defendant. The distinction is in fact clear. If an attempt at service is made, and actually reaches the defendant, although it be not made or returned in the form and manner required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack. But where the attempted service does not reach the defendant at all, there is no service, and the proceedings are void. We consider this a case of the latter class. Service was not made upon any person having any connection whatever with the corporation. Indeed, at the time the suit was begun, the corporation was practically extinct. It had no officers, no place of business and a solitary stockholder which was itself a corporation of a distant state. We therefore think the court erred in finding the judgments valid. Attention is called to *Janes v. Howell*, 37 Neb. 320; 40 Am. St. Rep. 494. But that case is not applicable. It belongs to that class in which the court has frequently held that one seeking the affirmative relief of a court of equity against a void judgment must disclose that he has a meritorious defense to the cause of action on which the judgment was based. These cases are not applicable to cases like the present, where the party claiming under <sup>280</sup> the judgment is seeking affirmatively to enforce it. This he cannot do if the judgment is void.

The plaintiff, both in its petition and in its evidence, rested its case entirely on the judgments. While the pleading of the judgments was, perhaps, an implied pleading of an indebtedness, there was in the evidence no proof of an indebtedness to the plaintiff outside of the records of the void judgments. Therefore, the plaintiff, failing to establish its judgments, failed entirely to establish its relationship as creditor of the type foundry. We mention this particularly for the purpose of guarding against any inference that the plaintiff is entitled to no relief if it be in fact a creditor. The bill of sale to Marder, Luse & Co. was clearly void

as against other creditors. It has been held that a corporation may not prefer a debt owing to its own directors, or a debt for which such directors are sureties: *Ingwersen v. Edgcombe*, 42 Neb. 740; *Tillson v. Downing*, 45 Neb. 549. The principle which governs these cases applies to such a case as this, where, if we concede that one corporation may become the owner of all the stock of another, the officers of the former, acting in its behalf and also on behalf of the latter, prefer a debt from the latter to the former, especially when such preference absorbs all the assets of the debtor corporation. It may be that the situation at the time was such that the plaintiff could not maintain any action against the type foundry because of the disappearance of its whole organization and of all its assets through the wrongful act of the defendant. If so, it is very probable that this action might be maintained against Marder, Luse & Co. without its being sustained by judgments against the type foundry. As the record does not, at this time, present these questions, they are not decided. We merely desire to clearly indicate that they are not here being determined adversely to the plaintiff. Under the circumstances, we think the proper course is to remand the action to the district court for a new trial.

Reversed and remanded.

**PROCESS—OFFICER'S RETURN OF SERVICE—COLLATERAL ATTACK.**—In an ordinary collateral attack, it is not permissible to contradict judicial recitals or to disprove official returns of the service of process: Monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 244. See *Goddard v. Harbour*, 56 Kan. 744; 54 Am. St. Rep. 608, and note.

**JUDGMENT BASED UPON DEFECTIVE RETURN OF SERVICE OF PROCESS—COLLATERAL ATTACK.**—A judgment entered when the proof of the service of process was defective and insufficient is not void if service of such process had in fact been made before a judgment was rendered. It is the fact of service which gives the court jurisdiction, not the proof of service: *Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145, and note. See *Cruzen v. Stephens*, 123 Mo. 337; 45 Am. St. Rep. 549, and note.

**CORPORATIONS—SERVICE OF PROCESS UPON—WHEN INSUFFICIENT TO CONFER JURISDICTION.**—To bind a corporation, the service of process must be upon the identical agent provided by a statute: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204, and note; *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32; 41 Am. St. Rep. 831, and note. See extended note to *Hampson v. Weare*, 66 Am. Dec. 119-122.

**CORPORATIONS—RIGHTS OF OFFICERS AS PREFERRED CREDITORS.**—The property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers from dealing with it in such a manner as to secure preferences for themselves. So an unauthorized transfer of corporate property by a director and managing officer of an insolvent corporation, to discharge a debt of the corporation the payment of which the officer has guar-



anted, can have no other effect than to place the property in trust for the equal benefit of all the creditors of the corporation; Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78. But see *Schulfeldt v. Smith*, 131 Mo. 280; 52 Am. St. Rep. 628, and note; also, *Adams etc. Co. v. Deyette*, 8 S. Dak. 119; 59 Am. St. Rep. 751, and note.

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## FREMONT, ELKHORN AND MISSOURI VALLEY RAILROAD COMPANY v. HARLIN.

[50 NEBRASKA, 698.]

**PLEADING.—A GENERAL ALLEGATION OF NEGLIGENCE** is good against demurrer, but, upon motion, the pleader may be required to specifically state in what the negligence consisted.

**RAILWAYS.—GRANT OF RIGHT OF WAY WITH RELEASE OF DAMAGES** does not relieve from liability for subsequent negligence.

**IF A RAILWAY CORPORATION CARELESSLY AND NEGLECTENTLY CONSTRUCTS DITCHES ALONG ITS TRACK**, whereby lands are overflowed and crops damaged, it is answerable therefor, though the owner of such land has granted the right of way through it and released the corporation from all damages which he might sustain by the construction or use of the railroad.

**RAILWAYS.—A GRANT OF THE RIGHT OF WAY** for the construction of a railroad and the release of all damages to accrue from such construction have no greater effect than a judgment rendered in a condemnation proceeding, and hence do not relieve the corporation from liability for the negligent construction, maintenance, and operation of its road.

**STATUTE OF LIMITATIONS IN ACTIONS FOR DAMAGES FROM CONSTRUCTION OF DITCHES.**—Where ditches are constructed along a railway track in such a manner that the adjacent lands may be injured thereby, their owner may recover for each successive injury, and hence the statute of limitations does not commence to run against him upon the completion of the ditches.

**RAILWAYS, LIABILITY OF FOR DITCHES.**—That a ditch is properly constructed along the track of a railway with reference to its use for railway purposes does not relieve the corporation from liability to the owner of the adjacent lands, if such ditch was so constructed as to unnecessarily and negligently injure his property.

**DAMAGES, MEASURE OF.**—In an action by a landowner to recover damages of a railway corporation for constructing and maintaining ditches so as to unnecessarily and negligently injure his land, he may recover for the destruction of his crops and trees, and the measure of his recovery for the damage to his land is the difference between its value immediately before and immediately after the debris was deposited thereon.

**EVIDENCE—BURDEN OF PROOF.**—If a railway company sued to recover damages alleged to have been suffered by the plaintiff from the negligent construction of ditches defends on the ground that such damages resulted from a storm so unprecedented as to constitute an act of God, the burden of proof is upon the corporation; but it is error for the court to instruct the jury that if the evidence is evenly balanced on this issue, they should find for the plaintiff, there being a general denial in the answer.

William B. Sterling and J. F. Frick, for the plaintiff in error.

C. Hollenbeck, contra.

**700** RAGAN, C. Charles Harlin brought this suit in the district court of Saunders county against the Fremont, Elkhorn & Missouri Valley Railroad Company, hereinafter called the railroad company, to recover damages which he alleged he had sustained by reason of the destruction of certain of his crops, certain trees growing upon his land, and by reason of the deposit on his land of quantities of debris, all caused by the negligence of said railroad company in constructing certain ditches on its right of way in such a manner as to cause the waste and surface waters to be **701** collected in said ditches and precipitated on his land. Harlin had a verdict and judgment, and the railroad company prosecutes here a petition in error.

1. The first point argued in the brief is, that the petition does not state facts sufficient to constitute a cause of action. The petition, so far as material here, is as follows: "That the defendant . . . carelessly and negligently constructed its ditches along . . . said railroad track . . . through the lands of plaintiff . . . in such a manner as to cause the waste and surface waters to collect along and adjoining the said railroad track, and to lead and precipitate the same directly on and over the adjoining lands of plaintiff; that during the years 1889 and 1890 the water so precipitated and turned from its natural course over upon said lands of plaintiff totally destroyed large portions of crops of corn and potatoes then growing upon said land and the property of plaintiff; and during the year 1891, by reason of the said careless and negligent construction of said ditches, large quantities of clay and sand were carried by the water from said ditches over and upon the lands of said plaintiff, totally destroying the crops of potatoes and corn then standing and the property of said plaintiff; and by reason of the depositing of said sand and clay on said land a large number of trees standing and growing thereon were totally destroyed, and a large quantity of said land was greatly and permanently damaged, so as to be unfit for the production of crops." The averments of this petition do not disclose the particular acts or omissions of the railroad company in constructing its ditches which the pleader alleges were negligent. It is not averred that the railroad company was guilty of negligence because it constructed ditches, or in constructing them where it did; nor that they were too narrow or too shallow. The allegation of negligence is a general one, and had a motion been made to require the pleader to specifically state in what the negligence of the railroad company consisted, it would doubtless have been

sustained. But a general <sup>702</sup> allegation of negligence is good against a demurrer; and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant: Omaha etc. Ry. Co. v. Wright, 47 Neb. 886. We think, therefore, that the petition states a cause of action.

2. At the time the railroad company constructed its road over the lands of plaintiff they were owned by a man named Shannon, the plaintiff's grantor. Before the construction of the road over the lands Shannon, for a valuable consideration, conveyed to the railroad company a right of way over his lands. In this conveyance occurs the following: "For the consideration aforesaid do hereby release and discharge the said party of the second part [the railroad company], its successors and assigns, from all costs and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain in any way, by reason of the construction, building, or use of the said railroad." On the trial of this case, the railroad company offered in evidence, under proper pleadings, this right of way deed. It was excluded, and this action of the district court, it is now insisted, was erroneous. The contention is, that this was a release to the railroad company by Shannon of all damages which he had or might afterward sustain by reason of the construction and operation of this road over his lands; that the release would bar this action were it brought by Shannon, and that the release is likewise binding upon his grantee. We agree with counsel for the railroad company that if this release would bar Shannon from maintaining this action, it likewise precludes his grantee, as the latter took the land burdened with the railroad company's easement, and he cannot maintain any action against the railroad company for damages growing out of the construction, operation, or maintenance of this road that his grantor could not maintain had he continued the owner of the land. The question, therefore, is whether the release in the right of way deed would bar this action had it been brought by Shannon. <sup>703</sup> The question is an important one, and to sustain his theory counsel for the railroad company have cited us to the following authorities:

Hoeffditz v. Southern Pac. Ry. Co., 129 Pa. St. 264: In this case Hoeffditz, for a valuable consideration, released and discharged a railroad company and its successors from all suits, claims, demands, and damages whatever by reason of its entry upon his land and appropriating a part thereof toward the construction of its railroad and works connected therewith. At the



time of executing the release, the railroad company had erected on the land acquired from Hoeffditz an embankment, in which was a culvert. Subsequently, Hoeffditz sued the railway company for damages caused by the water which passed through this culvert; and the court held that the release was a bar to the action.

**Updegrove v. Pennsylvania etc. R. R. Co.**, 132 Pa. St. 540, is very much like the case at bar. Updegrove, for a consideration, deeded the railway company the right of way over his land, and released it from all claims for damages by reason of the taking and using of the lands for its railroad, or by reason of the construction and maintenance of its road over said land. The release appears to have been executed before the road was built, and the court held that this release barred Updegrove's action against the railroad company for damages caused by an overflow of water which resulted from the construction of a ditch and culvert on the right of way. The court based its decision upon the proposition that the damages sued for were in contemplation of the parties at the time of the execution of the right of way deed. In other words, that the damages sued for entered into and formed a part of the consideration paid by the railroad company for the right of way.

In **Radke v. Minneapolis etc. Ry. Co.**, 41 Minn. 350, Radke sued the railroad company for damages to his land caused, as he alleged, by the negligent construction of its railroad over or near his land. The negligence <sup>704</sup> complained of was that the railroad company neglected to put a culvert in an embankment. After the embankment was constructed, Radke, for a consideration, conveyed to the railroad company a right of way over his land. But the right of way deed contained no release of damages. The court, however, held that the absence of this release from the right of way deed was unimportant, and said: "When he conveyed the premises to the defendant he knew that there was no culvert through the embankment . . . where he now claims it should be placed in order to carry the water off his land, and he knew that the railroad embankment had already stopped the flow of water. It cannot affect the case that he may not then have apprehended the full extent of the injury which would result from this in future." To the same effect are **McCarty v. St. Paul etc. Ry. Co.**, 31 Minn. 278; **Milwaukee etc. Ry. Co. v. Strange**, 63 Wis. 178.

In **Chicago etc. R. R. Co. v. Smith**, 111 Ill. 363, the owner of certain land conveyed to the railroad company a right of way

across the same. The deed recited: "For the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad," and the court held that the right of way deed was a bar to an action by the owner's grantee against the railroad company for damages caused to his property by its engines throwing smoke, cinders, ashes, and sparks of fire thereon, and by the shaking of the house on said premises. But it is to be observed that the damages claimed resulted from the usual and ordinary operation of the road. Smith did not claim that the damages resulted from the negligent operation of the road; and the case rests upon the principle that when anything is granted, all the means to attain it and all the fruits and effects of it are granted also; and the court correctly held that the shaking of the house and the smoke, cinders, and ashes thrown by passing engines were necessarily incident to and inseparable from the operation of the <sup>705</sup> railroad, and were conclusively presumed to have been adjusted and settled by the consideration paid by the railroad company to the original owner at the time he executed the right of way deed. The case is not an authority for the contention of the railroad company in the case at bar. To the same effect are *Chicago etc. Ry. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 341; *Chicago etc. Ry. Co. v. McAuley*, 121 Ill. 160.

In *St. Louis etc. Ry. Co. v. Hurst*, 14 Ill. App. 419, it seems that the railroad company constructed its road over the land of Hurst. At or before this time, for a consideration, Hurst conveyed to the railroad company a right of way deed over his lands, and in this deed he released and relinquished all claims for damages by reason of the location, completion, and construction of the road. Years after the road had been completed and in operation the railroad opened a ditch by the side of its track, and Hurst claimed that the construction of this ditch changed the natural channel and flow of water and caused the same to flow upon his land, to his damage, for which he brought suit. On the trial, the railroad company offered the right of way deed in evidence. The trial court excluded it, and on appeal its action in this respect was reversed. The court seems to have placed its ruling upon the ground that the railroad company was entitled to have the jury say, as a matter of fact, whether the construction of the ditch complained of was a necessary act in the proper maintenance of the road, and held that if the construction of the ditch was necessary to the maintenance and operation of the road,

that the release was a bar to the action; and said that before Hurst could recover damages he must make it appear that the acts of the railroad company amounted to a departure from or were not embraced within the purposes for which the release was made. This case is an authority so far as it goes against the contention in support of which it is cited.

Of these authorities the cases from Pennsylvania and Minnesota only, we think, can be said to sustain the <sup>706</sup> proposition contended for by counsel for the railroad company here. But our construction of this right of way deed is, that by it Shannon acknowledged satisfaction for the value of all the land appropriated of his by the railroad company for its right of way, and released and discharged the railroad company from all damages which the remainder of his land had sustained or would sustain by reason of the non-negligent construction, maintenance, and operation of the road across his lands for all time. This right of way deed must be read, construed, and given the same effect that we would give to a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over Shannon's land; and had the railroad company pleaded and offered in evidence such a judgment instead of this right of way deed, the question would have been whether the damages sought to be recovered in this action were embraced in the condemnation judgment. It was not within the contemplation of the parties to this right of way deed that the railroad company would negligently construct, maintain, or operate its road; and if, in the trial of the condemnation proceedings, Shannon had sought to recover damages from the road upon that theory, he could not have done so.

In *Delaware etc. Ry. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214, it was held: "A conveyance of land for railroad purposes, or an assessment of the value of lands taken and damages under proceedings to condemn, only bars the recovery of such damages as naturally and necessarily arise from the use of the premises for the authorized purpose, and will not bar the recovery of damages for injuries arising from an unskillful or improper construction or negligence in operating the road. For such damages the remedy by action remains notwithstanding the conveyance or condemnation."

In *King v. Iowa etc. Ry. Co.*, 34 Iowa, 458, it was held that, in a proceeding to appropriate land for a right of way of a railroad already constructed, evidence of damages resulting <sup>707</sup> from de-



fective construction or the like is not admissible. While such damages may furnish cause of action to recover the same in an action therefor, they are not to be considered in assessing the compensation to be allowed the owner for the right of way appropriated.

In *Stodghill v. Chicago etc. Ry. Co.*, 43 Iowa, 26, 22 Am. Rep. 211, Stodghill sued the railroad company for damages for diverting a stream of water from its natural course, thus preventing it from flowing upon his land and depriving him of the use of the stream. The railroad company interposed as a defense that, before it built its road over Stodghill's land, it acquired from him, for a valuable consideration, the right of way; that its right of way passed over a creek, and that when it constructed its road it built a bridge over this creek; that some eight years afterward, on account of an increase of business and for the safety of travel, it took out the bridge and built a fill across the creek. The supreme court said: "As it is not claimed by appellant that greater rights were acquired by the plaintiff's deed than would have been acquired by proceedings in condemnation, we shall assume for the purposes of this opinion that they were the same. The question, then, which we are called upon to decide is this: Are the damages resulting to the landowner from the diversion of a natural stream of water, where such diversion is required by good railroading and a reasonably prudent construction of the roadbed, to be regarded as having entered into and been covered by the condemnation and appraisal?" and held that the right of way deed was not a bar to the action.

*Hunt v. Iowa etc. Ry. Co.*, 86 Iowa, 15, 41 Am. St. Rep. 473, is a case almost identical with the one at bar. Hunt sued the railroad company for damages sustained by him, as he alleged, by reason of its negligently constructing a ditch on its right of way, whereby surface waters destroyed his crops and deposited debris upon certain of his land and depreciated its value. The ditch complained of was constructed at the time the road was built across Hunt's <sup>708</sup> land, and at this time another party owned the land. It does not appear whether the railroad acquired its right of way over the land by condemnation proceedings or by conveyance from the owner; but the case was tried and finally considered by the supreme court upon the theory that the railroad company, at the time it built its road and constructed the ditch complained of, did so in pursuance of a right of way granted to it for that purpose by the then owner of the land. The railroad com-

pany insisted that the damages sued for were such as the law conclusively presumes were included in the amount paid by the railroad company originally for its right of way. But the supreme court said: "From these facts we think it is clear that the damage sued for herein cannot be said to have been considered and settled for in condemnation proceedings." The court then cited *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 308, 50 Am. Rep. 746, and *Sullens v. Railroad Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, and continued: "It is well settled that in assessing damages to the landowner for right of way taken, regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation," and after citing *Fleming v. Chicago etc. Ry. Co.*, 34 Iowa, 353, *King v. Iowa etc. Ry. Co.*, 34 Iowa, 458, *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa, 680, continued: "The plaintiff's grantor had a right to presume, when he conveyed the land to the company that built the road, that the work of constructing the road would be properly done; that sufficient culverts for the passage of surface water, at proper places, would be put in and maintained. . . . By neglect and carelessness on part of the defendant, surface water from several hundred acres of land . . . was gathered in the ditches of defendant, carried along, and finally discharged upon her [the plaintiff's] land. Damages arising from such an act have never been held to be included in the price paid for right of way." This has long been the doctrine of this court.

<sup>709</sup> In *Burlington etc. R. R. Co. v. Schluntz*, 14 Neb. 421, it was held: "An award of damages under the statute for right of way for a railroad embraces only those damages which may reasonably be anticipated upon the assumption that the road will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way." To the same effect see *Omaha etc. Ry. Co. v. Todd*, 39 Neb. 818, and *Chicago etc. Ry. Co. v. O'Connor*, 42 Neb. 90.

The district court did not err in excluding the right of way deed from the jury.

3. The next argument is, that the court erred in refusing to give to the jury an instruction, at the request of the railroad company, to the effect that though they found that the ditches of the railroad company were negligently constructed, and that by reason thereof Harlin had sustained injury as claimed by him, still, if they further found that the ditches were constructed and

completed more than four years immediately preceding the commencement of this action, they should find for the defendant. In other words, the instruction was a request to the court to hold that Harlin's action was barred by the statute of limitations, as the evidence is undisputed that the ditches were constructed and completed more than four years before this suit was brought. The contention of counsel for the railroad company is, that the cause of action made the subject of this suit was the negligent construction by the railroad company of its ditches, and that that cause of action arose when the ditches were completed. To sustain this contention we are cited, among others, to the following authorities:

North Vernon v. Voegler, 103 Ind. 314: In that case the city, by improving or grading one of its streets, changed the flow of the surface water so as to gather it into a channel and pour it upon Voegler's lots. For this he sued the city for damages, alleging that its negligent grading of the street had injured and depreciated his real estate. He recovered a judgment. Subsequently, <sup>710</sup> another overflow occurred and he again sued the city, but the court held that the judgment in the first action was a bar to the second, as all damages which Voegler has sustained to his real estate, both past and prospective, could have been recovered in the first action. The court treated the case as though both the actions brought by Voegler were for the permanent depreciation in value of his real estate by reason of the manner in which the city had improved its street. It is needless to remark that that is not this case.

Another case cited in support of the contention under consideration is Baldwin v. Oskaloosa Gas Light Co., 57 Iowa, 51. There Baldwin sued the gaslight company for damages for maintaining its gasworks in the immediate vicinity of his premises. The jury found that the gasworks were permanent, and the court held that this was equivalent to a finding that the injury was permanent, and that, therefore, Baldwin's cause of action accrued when the gasworks were first located and that consequently his action was barred by the statute of limitations. To the same effect is Stodghill v. Chicago etc. Ry. Co., 53 Iowa, 341.

Another case cited by counsel is Chicago etc. Ry. Co. v. Maher, 91 Ill. 312. In that case the railroad company placed a protection to a drawbridge in a river and thus permanently depreciated the value of an adjoining lot. The owner of the lot sub-



sequently conveyed it to Maher, and she sued the railroad company for damages which the real estate had sustained by reason of the improvement which the railroad company had made adjoining her lot. But the court held that the injury caused to the real estate was permanent in its character, and the cause of action sued for arose when the improvement was first constructed. In other words, that the plaintiff's cause of action was the amount that her lot had been depreciated in value by reason of the improvement placed in the river adjoining it by the railroad company, and that this depreciation took place, this injury and this damage <sup>711</sup> accrued, at the time the improvement was erected. And this seems to be the principle upon which all the cases cited by counsel for the railroad company to support the contention under consideration rest; and such is the doctrine of this court, as announced in *Chicago etc. Ry. Co. v. O'Connor*, 42 Neb. 90. And the principle that controls the case just cited is the same principle that controls the case at bar, namely, that the right of action accrued when the injury happened: See *Omaha etc. Ry. Co. v. Standen*, 22 Neb. 343; *Cedar Lake Hotel Co. v. Cedar Creek etc. Co.*, 79 Wis. 297.

One of the defenses interposed in *Hunt v. Iowa etc. Ry. Co.*, 86 Iowa, 15, 41 Am. St. Rep. 473, was the statute of limitations. It will be remembered in that case Hunt claimed damages because of the negligent construction by the railroad company of certain ditches on its right of way, whereby the surface water overflowed his land and destroyed his crops. The ditches were constructed more than five years before the action was brought. The court said: "It is clear that plaintiff herein could not have maintained an action until some actual injury was caused to her by diversion of the water by defendant. There is here no claim of any such injury until 1888—less than two years prior to the commencement of this action. True, the evidence shows various overflows of plaintiff's land prior to that, but if they caused any injury, no damage is claimed for it."

In *St. Louis etc. Ry. Co. v. Biggs*, 52 Ark. 240, 20 Am. St. Rep. 174, the court held that where a railroad company constructs its roadbed so that at times it causes overflow to adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.

In *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, it was said that in an action against a railroad company

for damages caused by occasional overflows of surface water, which has been diverted from its natural channel by the construction of its road, the statute <sup>712</sup> of limitations does not begin to run from the construction of the road, but from the occurrence of each overflow, since each overflow constitutes a separate cause of action.

The court did not err in refusing to give the instruction requested.

4. The next argument is, that the court refused to instruct the jury, on behalf of the railroad company, to the effect that if the jury found that the ditches were properly constructed with reference to the use of the same for railway purposes, that they should find for the railroad company. Of this instruction we remark, first, that the railway company was not prejudiced by the court's refusal to give it, as the court had already, at the request of the railroad company, instructed the jury to the effect that the railroad company could not be held liable if the ditches as constructed were properly constructed for railway purposes. Certainly, the railroad company was not entitled to this instruction. The material issue on trial was not whether the ditches were sufficient and proper for the draining of the railroad company's right of way and roadbed, but the material issue was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the property of its neighbor. The instruction under consideration refused by the court, if given, would have made the case turn on an immaterial issue. A railroad company might construct a bridge, an embankment, a culvert, or a ditch sufficient for the maintenance and operation of its road, and one entirely proper for that purpose, and yet the improvement made might be of such a character as to unnecessarily and negligently injure the property of an adjoining proprietor. A lotowner might construct a conduit across his lot in such a manner as to gather all the rains and melting snows and carry them off. This conduit might be properly constructed for the purpose for which it was intended; the highest degree of care and skill may have been exercised by the lotowner in its building, and it may have subserved in the most satisfactory <sup>713</sup> manner the ends for which it was built, and yet the operation of this conduit might injure the property of the lotowner's neighbor, and if it did the lotowner, when called upon by his neighbor for damages, could not successfully defend by saying: "The conduit is properly constructed for the purpose for which I intended it." This is not a

suit in which the plaintiff claims damages because the railroad company did not properly construct its ditches for railroad purposes, but the principle upon which this action rests is, that the railroad company, in the lawful possession and use of its property, so used and managed it as to unnecessarily and negligently inflict an injury upon its neighbor.

In *McCleneghan v. Omaha etc. Ry. Co.*, 25 Neb. 523, 13 Am. St. Rep. 508, this court said: "A railroad company must construct its road not only with reference to the safety of the traveling public, but also with reference to the rights of adjacent land-owners." The following cases rest on the same principle: *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897; *Lincoln etc. Ry. Co. v. Sutherland*, 44 Neb. 526; *Fremont etc. Ry. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482; *Jacobson v. Van Boening*, 48 Neb. 80; 58 Am. St. Rep. 684.

But it is said in support of the contention under consideration that this court has ruled, in *Morrissey v. Chicago etc. Ry. Co.*, 38 Neb. 406, that if an improvement made by a railway company in the construction, operation, or maintenance of its road is properly made for railroad purposes, then if another sustain damages by reason of such improvement or the manner in which it is constructed or maintained he is without remedy. Once more we disclaim having ever consciously so held, and once more call attention to the fact that we do not so understand the *Morrissey* case. As we said in *Jacobson v. Van Boening*, 48 Neb. 80, 58 Am. St. Rep. 684, an examination of the *Morrissey* case discloses that we had in view the fact that there was neither pleading nor proof that the railroad embankment which caused the injury sued for in that action had been unnecessarily or negligently constructed; that is, the evidence did not <sup>714</sup> show that the embankment complained of was negligently constructed for railroad purposes; nor that the railroad company, by constructing the embankment that it did, in the manner that it did, unnecessarily and negligently caused the injury sued for. The embankment was properly constructed for railroad purposes, and the manner of its construction was not a negligent one with reference to *Morrissey*.

5. As already stated, in the action at bar Harlin claimed damages for the destruction of certain of his crops, for the destruction of certain trees growing upon his land, and for damages to certain portions of his land caused by the deposit of sand and clay thereon. With reference to the measure of Harlin's damages,



the court instructed the jury that he was entitled to recover the value of the crops destroyed, the value of the trees killed; and that the measure of his recovery for the damage to his land was the difference between its value immediately before and immediately after the debris was deposited thereon. It is now insisted that the court adopted an improper measure of damages. The instruction was correct: See *Fremont etc. Ry. Co. v. Crum*, 30 Neb. 76; *Kansas City etc. Ry. Co. v. Rogers*, 48 Neb. 653.

6. In addition to a general denial that Harlin had sustained any damages, and that it had been guilty of any negligence in constructing its ditches, the railroad company interposed the defense that if Harlin had sustained damages, as he claimed, that they resulted from a rain storm so unprecedented as to amount to the act of God. The district court, upon its own motion, instructed the jury that the burden of proof was upon the railroad company to establish this defense by a preponderance of evidence, and "if the defendant has failed to prove the above material allegation by a preponderance of the evidence, or the evidence is evenly balanced thereon, then you should find for the plaintiff." This instruction was excepted to, and its giving is assigned as error. It is needless to say that the instruction was erroneous. The burden <sup>715</sup> was upon the railroad company to establish this defense by a preponderance of the evidence; but even if the railroad company failed to establish the defense interposed by it, it did not follow that Harlin was entitled to recover. A careful examination of the entire charge of the court constrains us to the conclusion, not only that the instruction was erroneous, but that its giving was prejudicial to the railroad company, and for the giving of this instruction the judgment of the district court must be reversed.

Reversed and remanded.

Irvine, C., dissenting as to measure of damages as to trees destroyed.

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**NEGLIGENCE—PLEADING.**—A complaint charging negligence in general terms is good upon demurrer: *Madden v. Port Royal etc. Ry. Co.*, 35 S. C. 381; 28 Am. St. Rep. 855, and note.

**RAILROAD COMPANIES—DAMAGES INCLUDED IN PAYMENT FOR RIGHT OF WAY—OVERFLOW OF ADJOINING LAND.**—Compensation made by a railroad company when its road is built includes simply damages arising from the proper construction of the road, and does not relieve it from subsequent damages occasioned by its cutting the embankment of its road, and putting in a narrow trestle through which accumulated water flows, to the injury of a landowner who has been thus compensated: *Kansas City*

etc. R. R. Co. v. Lackey, 72 Miss. 881; 48 Am. St. Rep. 589, and note; Hunt v. Iowa Cent. Ry. Co., 86 Iowa, 15; 41 Am. St. Rep. 473, and note. There is authority, however, for a contrary view: Yazoo etc. R. R. Co. v. Davis, 73 Miss. 678; 55 Am. St. Rep. 562, and note; Watts v. Norfolk etc. Ry. Co., 39 W. Va. 196; 45 Am. St. Rep. 894, and note. See Missouri Pac. Ry. Co. v. Keys, 55 Kan. 205; 49 Am. St. Rep. 249, and note.

**RAILROADS—DAMAGES FROM OVERFLOW OF LANDS—STATUTE OF LIMITATIONS.**—When the first overflow of lands, arising from the negligent discharge of surface water thereon, which causes damage, furnishes no safe or substantial basis from which future damages accruing from year to year from the same cause can be calculated, the right of action is not barred by limitation though such first overflow occurred more than five years prior to the commencement of the suit: Hunt v. Iowa Cent. Ry. Co., 86 Iowa, 15; 41 Am. St. Rep. 473, and note. See Pennsylvania etc. Ins. Co. v. Heiss, 141 Ill. 35; 33 Am. St. Rep. 273; and Ohio etc. Ry. Co. v. Thillman, 143 Ill. 127; 36 Am. St. Rep. 359.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**NEW YORK.**

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**SAGE v. MAYOR.**

[154 NEW YORK, 61.]

**NAVIGABLE STREAMS AS BOUNDARIES.**—Where lands are described in a deed as bounded by a navigable river, where the tide ebbs and flows, the title ends at high-water mark.

**NAVIGABLE STREAMS, RIGHTS OF OWNERS OF LAND FRONTING UPON.**—Persons owning lands fronting upon navigable streams are entitled, as against all but the sovereign as trustee of the people at large, to certain valuable privileges or easements, including the right of access to the part of the stream in front thereof, for the purpose of loading and unloading boats, nets, and the like.

**RIPARIAN OWNERS, RIGHTS OF ARE SUBORDINATE TO THE RIGHT TO MAKE PUBLIC IMPROVEMENTS.**—When the interest of the whole people requires the improvement of the waterfront for the benefit of navigation and commerce, it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvement upon the waterfront for that purpose without compensating the riparian owner, other than by giving him a pre-emptive right of purchase in case of a sale.

**RIPARIAN OWNERS, RIGHTS OF IN NAVIGABLE WATERS.**—Although, as against individuals and the unorganized public, riparian owners have special rights to the tideway that are governed and protected by law, as against the general public as organized and represented by the government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by grant or covenant on the part of the state.

**NAVIGABLE WATERS, RESERVATION IMPLIED IN GRANTS OF LAND FRONTING UPON.**—In every grant of lands bounded by navigable waters, where the tide ebbs and flows, made by the crown or the state as trustees for the public, there is reserved, by implication, the right to so improve the waterfront as to aid navigation, for the benefit of the general public, without compensation to the riparian owner.

**NAVIGABLE WATERS, LANDS BENEATH ADJOINING THE CITY OF NEW YORK.**—By what are known as the Dongan



and Montgomerie charters, as confirmed by the first constitution of the state of New York, there vested in the city of New York all the surrounding land between high and low water mark.

**ACCRETIONS—LANDS RECLAIMED BY ACT OF MAN.**—The doctrine of accretions does not apply to land reclaimed by man through filling in land once under water. The title to land so filled in remains where it was before, unless the filling in was done wrongfully.

Suit to restrain the mayor, aldermen, and commonalty of the city of New York from using certain docks and bulkheads on lands until compensation should be made to the plaintiff therefor, and that the plaintiff be declared to have title in fee to a piece of land lying between the marginal street and the uplands not appropriated by the plans of the defendant, the statutes of the state, or otherwise, to any public use. The plaintiff was the owner of a parcel of land on the Harlem river, a navigable stream in which the tide regularly ebbs and flows. His title was based upon a grant made by Governor Nichols, October 11, 1667, purporting to convey to the inhabitants and freeholders of the village of New Harlem certain lands bounded by the Harlem river, together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting, and fowling, and all other profits, emoluments, and other hereditaments belonging to the said lands and premises within the said bounds and limits set forth, belonging or in any wise appertaining." This grant was confirmed by Governor Dongan March 7, 1686, and there was no doubt that the plaintiff became thereunder seised and possessed of the premises claimed by him, so far as they consisted of lands which, in the state of nature, were above water. He, however, further claimed that by virtue of this grant he had the rights and easements ordinarily belonging to the riparian owner of lands bounded by navigable tide water rivers, and that he had also acquired from the same source title to the tideway for some distance into the river. The claim of the city of New York, represented by the defendants, was that it had acquired title to all lands between high and low water mark in front of the uplands claimed by the plaintiff, under a grant made by Governor Dongan on the 26th of April, 1686, purporting to convey to the mayor, aldermen, and commonalty of the city of New York "all the waste, vacant, unpatented, and unappropriated lands lying and being within the said city of New York and Manhattan Island aforesaid, extending and reaching to the low-water mark in, by, and through all parts of the said city of New York and Manhattan Island aforesaid, together with all rivers, rivulets, coves, creeks,

ponds, water, and watercourses in the said city and island, or either of them." This grant provided that the grantees might at any time thereafter "take in, fill, and make up, and lay out all and singular the lands and grounds in and about the said city and Island Manhattans, and the same to build upon, or make use of, in any other manner or way as to them shall seem fit as far into the rivers thereof, or that encompass the same as low-water mark aforesaid." This grant was confirmed by Governor Montgomerie January 15, 1730, and by an act of the colonial legislature of October 14, 1732, and also by the first constitution adopted by the state of New York. The city of New York further claimed the lands in controversy under the statutes of 1852, by which it was authorized to lay out an exterior street along the Harlem river, and the title was conveyed to it to the lands under water from low-water mark to and including such exterior street, subject to the pre-emptive right of the adjacent owner to purchase in case of a sale by the city. Under the statutes of 1857 a bulkhead line was established in the Harlem river outside of the line of low-water mark; and, under the statutes of 1871, the state, through its officers, was authorized to convey, and did convey, to the city lands under the water out to a line parallel with and three hundred feet beyond such bulkhead line. In 1887, a plan having been adopted for the improvement of the waterfront of the Harlem river, the defendants were building a seawall in conformity with such plan beyond the line of low-water mark, past the lands of the plaintiff, and were filling in behind such wall and intended to continue to complete the wall and the filling in in conformity with such plan. The lands claimed by the plaintiff were at the date of the Nichols grant, below high-water mark, and some part thereof below low-water mark. This land had been filled in pursuant to legislative enactment by the state for the improvement of the waterfront of the city of New York. The outer portion thereof consisted of bulkheads, docks, and piers, traversed by a marginal street, one hundred and twenty-five feet wide, running parallel with the river and below low-water mark. Between the marginal street and the plaintiff's upland was a piece of filled-in land not appropriated by any plan yet adopted to any public use. None of the conveyances under which plaintiff claimed executed prior to 1852 purported to extend beyond high-water mark, but afterward, when conveyances were made, the low-water mark was described as the boundary line, and in 1861, when the plaintiff acquired title, his conveyance purported

to extend as far out as the bulkhead line. The special term dismissed the complaint, and upon appeal to the appellate division, the action of the special term was affirmed, one justice dissenting.

William C. De Witt, for the appellant.

Francis M. Scott, for the respondent.

**69** VANN, J. The lands granted by Governor Nichols to the inhabitants of the village of New Harlem were bounded on the east by the Harlem river, which was made by specific mention the limit of the conveyance in that direction. After the lands intended to be conveyed had been thus definitely bounded in the deed, a clause followed which, in the profuse language of ancient documents, described the appurtenances so fully as to give rise to the claim now made that the boundaries of the grant itself were enlarged thereby. As the western shore of the river below high-water mark consisted largely of "meadows, pastures, and marshes," it is argued that by including those words, with many others, in the description of the appurtenances, it was intended to include the meadows, pastures, and marshes adjoining the bank of the river as a part of the grant. Whatever force the argument might otherwise have, it completely fails in this instance, because the long description of appurtenances is ended and limited by the words "within the said bounds and limits set forth," thus making it clear that there was no intention to push the bounds of the grant out into the river or to extend them beyond its western bank.

When lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark, as the law stood at the date of the Nichols charter and as it stands to-day: *Mayor v. Hart*, 95 N. Y. **70** 443; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *Roberts v. Baumgarten*, 110 N. Y. 380; *Barney v. Keokuk*, 94 U. S. 324, 336; *Hale's De Jure Maris*, 96; *Moore's Foreshore and Seashore*, 782; 2 *Blackstone's Commentaries*, 347; *Comyn's Digest*, tit. Grant, G., 7, 12; *Devlin on Deeds*, sec. 1028; *Gerard's Title to Real Estate*, 851; *Gould on Waters*, sec. 175; 3 *Kent's Commentaries*, 427, 432; 4 *Am. & Eng. Ency. of Law*, 2d ed., 820. The grantees in that instrument, therefore, took title to the uplands lying upon the river, but not to the tideway or to any land below high-water mark. In other words, they became simply riparian proprietors upon tide water, with such title, rights, and privileges only as belong



at common law to the owners of upland washed by waters where the tide ebbs and flows. While the title of such owners did not extend beyond the dry land, they were entitled, as against all but the crown as trustee for the people at large, to certain valuable privileges or easements, including the right of access to the navigable part of the river in front for the purpose of loading and unloading boats, drawing nets and the like: *Rumsey v. New York etc. R. R. Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600; *Saunders v. New York etc. R. R. Co.*, 144 N. Y. 75, 87; 43 Am. St. Rep. 729; *Angell on Tidewater*, 22, 64. These riparian rights were property belonging to the riparian owner, who could not be deprived of them without his consent, or by due process of law, although he could only use them subject to the rights of the public. The title to the tideway and to the land beyond continued in the English crown, as a public trust, after the Nichols charter the same as before for nearly twenty years, and until the year 1686, when Governor Dongan granted to the city of New York all the land between high and low-water mark, and his grant was subsequently confirmed by Governor Montgomerie, by the colonial legislature and by the first constitution. The title to the remaining lands now in controversy, still farther out in the river, continued in the crown as a prerogative right until, by the Revolution and the treaty of peace between the colonies and England, it passed to the state of New York, which subsequently, by various legislative acts and proceedings had <sup>71</sup> thereunder, granted it to the city of New York: *Martin v. Waddell*, 16 Pet. 367. As all of these grants were made after the date of the Nichols charter, according to the general rule, they could have no effect upon the riparian rights of the grantees named therein, or of their successors in title, as that would violate vested rights by taking away property from one and giving it to another without due process of law. Whatever the common law may have been prior to Magna Charta, after the date of that venerable instrument, even the king of England could not grant to one subject that which he had already lawfully granted to another. While the English parliament, being restrained by no constitution that it cannot override if it so wills, can take the property of an individual for public use without making compensation, it is not claimed that any of the grants under consideration were made pursuant to an act of parliament. As the colonial governors and legislatures derived their powers from the crown, they could not interfere with private property any more than the

crown itself: *Martin v. Waddell*, 16 Pet. 367; *Johnson v. M'Intosh*, 8 Wheat. 595. But while the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, when the interest of the whole people requires an improvement of the waterfront for the benefit of navigation and commerce, it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tidewater front for that purpose, without compensating the riparian proprietor, other than by giving him the pre-emptive right of purchasing in case of a sale. The foundation of the rule does not seem to have been clearly pointed out, although a review of the authorities demonstrates its existence.

In *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89, it was held by the court of errors that the owner of lands adjacent to the shore of the Hudson river at Albany, who had erected a wharf upon the same after a grant of land under water from the commissioners of the landoffice, could not maintain an action on the <sup>72</sup> case against those to whom subsequently the legislature gave the privilege of erecting a pier in the river for the purpose of constructing a basin to protect boats, although such pier entirely encompassed the wharf on the side of the water so as to leave no communication between it and the river, except through a sloop lock at one extremity of the basin, and although the privileges of the owner of the wharf were materially impaired by the construction of the pier. The court declared his loss to be *damnum absque injuria*, and that the grant of the right to erect a wharf implies a reservation to the legislature of the right to regulate the use of it and of the adjacent waters. It was further held that the grant of the right to erect the pier, although subsequent to the former grant, did not violate that provision of the constitution of the United States which provides that no state shall pass a law impairing the obligation of a contract, nor that provision of the constitution of this state declaring that private property shall not be taken for public use without just compensation, and that the first grant did not preclude the legislature from making a great public improvement for the benefit of commerce without compensating the adjoining owner.

In *Furman v. Mayor etc. of New York*, the facts are imperfectly stated and the decision very meager as reported in 10 N. Y. 567, but both are very full as reported in 5 Sand. 16. In that case the legislature authorized the city of New York to

lay out streets and wharves seventy feet wide in front of the East and Hudson rivers, and provided that they should be built according to a plan adopted by the city, by and at the expense of the owners of the land adjoining, in proportion to the breadth of their several lots, and that upon filling up and leveling the lands under water in front of their uplands to the extent provided, they should become the owners of the made ground in fee simple, and entitled to the crantage and wharfage. After compliance by the owner and a conveyance to him from the city of the new land thus made by wharfing out, the city, under authority from the legislature, tendered to him a grant of the land under water for a certain distance still <sup>73</sup> farther out into the stream in front of his premises, with notice that if he refused to accept it at a certain valuation the said land would be granted to any person willing to take it. The statute under which this action was taken provided that after such a grant the grantee should build streets and wharves covering the land under water embraced in the grant. A bill was filed by the owner of the upland and of the made lands under the first grant to restrain the city from making the proposed second grant, but it was dismissed on the merits at the special term, and the judgment was affirmed at the general term and by the court of appeals.

Upon the argument of the appeal, the point was distinctly made that the plaintiff, as a riparian owner, had the right of ingress and egress to his waterfront; that the proposed action of the city would be an invasion of the rights of private property, and that he could not be deprived of that property without adequate compensation.

In *People v. New York etc. Ferry Co.*, 68 N. Y. 71, it was held that public grants to individuals, under which rights are claimed in impairment of public interests, are to be construed strictly against the grantee, who, although he can exclude all individuals from the permanent occupation of lands under tide-water held by him under such grant, cannot exclude the state, which still has the right to regulate the use of the premises in the interest of the public and for the protection of commerce and navigation. The court said: "Gore was the owner of the upland adjoining the lands under water embraced in the grant. The ownership of the adjacent upland, however, gave him no title to or interest in the lands under water in front of his premises. The title to lands under tidewaters, within the realm



of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable <sup>74</sup> waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right."

In *Towle v. Remsen*, 70 N. Y. 303, it appeared that the city of New York, prior to 1807, had title to the tideway, and in that year the state granted it land under water in front of the tideway, with a proviso giving the pre-emptive right to the owners of adjacent lands in all grants made by the city of lands under water. In 1837, the city granted to one who claimed to be the owner of the upland the water lots in front, consisting partly of the tideway and partly of land below low-water mark, reserving certain rents payable annually, and with a condition that if it should appear at any time that the grantee was not seised of an estate in fee simple of the adjoining land above high-water mark the grant should be void. The grantee did not in fact own the upland, and when this was established by litigation, the commissioners of the sinking fund canceled said grant, and in 1859 gave the plaintiff a conveyance of the same lots upon payment of the back rent. In an action of ejectment brought by the second grantee against the first, who had in the mean time constructed bulkheads and streets, the complaint was dismissed and the judgment of dismissal was affirmed by this court, which held that the city, by accepting title to lands beyond the tideway with said proviso, did not consent to qualify its title to the tideway so that it could thereafter only grant land therein to the persons to whom it could grant the adjoining lands under water. It was further held that under the Dongan and Montgomerie charters the city had an absolute fee to the tideway and could grant it to anyone that it chose, regardless of the wishes of the owner of the upland.

In *Mayor etc. v. Hart*, 95 N. Y. 443, the question to be decided was whether the owners of the uplands situated on the Harlem river in the former village of Harlem had an equitable claim to priority of purchase of lands under water in front of their premises in case the city sold the same, but incidentally the title to the tideway and the effect of the *Nichols*, *Dongan*,

and <sup>75</sup> Montgomerie charters was involved. The court held that the Nichols charter conveyed only to high-water mark, and that by the Dongan charter the city of New York acquired title to the tideway on the whole circuit of Manhattan Island and held it as an absolute fee. By an interesting historical argument the court showed that Harlem was established as a village within the general limits of the city itself for the promotion of agriculture, and the recreation and amusement of the city of New Amsterdam, and drew the inference from the surrounding circumstances that the Nichols grant should receive a limited construction. In the language of Judge Finch, who prepared the opinion: "The city was to be the seaport, and for this purpose its waterfront was to girdle the island, while the village was meant for a rustic hamlet, whose inhabitants should own cattle rather than ships. Without pursuing the subject in its details, it is enough to say that we have discovered no adequate reason for straying from the general rule in construing the Harlem patents, and are satisfied that the river line was at high-water mark, and so the city owned the tideway. Its title to so much of the lands in dispute as constituted the portion of the tideway adjacent to and in front of the upland owned by the defendants was thus established. That title in its origin was absolute. The city could sell the strip to whom it pleased, and it was unburdened with any pre-emptive privilege amounting to a legal right in any one." After referring to the pre-emptive right given by statute to owners under grants theretofore made by the city of lands beyond the tideway and to the equitable rights thereunder, the learned judge continued: "But those owning the upland in front of whom lay the absolute ownership of the city in the tideway, and who were already, or might be, cut off from the water by that ownership, had no such equity. A pre-emptive right in the extension without one in the tideway would do them no good by reason of that interposed strip, and would simply make the latter valueless to the city or its other grantee by in turn cutting off from both the waterfront." The court, with some hesitation, sustained <sup>76</sup> the equity of pre-emption claimed solely upon the ground that the city had granted both the filled-in land outside of the tideway, and a part of the tideway itself, to the claimant. This, however, was the utmost concession of rights to the riparian owner, as is evident from the last sentence of the opinion: "If thus some little shred or faint shadow

of riparian right on navigable waters is preserved in this state, through the sense of justice of the state and its municipal grantee, while on the longer coasts of other states the right is firmly pushed to low-water mark, and shielded by the law, we do not think the little thus gained is unwise, or inequitable, or an occasion of regret." Reference is made to the important case of *Whitney v. Mayor etc.*, which, although decided in this court in 1855, is not reported in the regular series, but may be found in 6 Abb. N. C. 329: See, also, *People v. Tibbetts*, 19 N. Y. 523; *People v. Canal Appraisers*, 33 N. Y. 461; *Kerr v. West Shore R. R. Co.*, 127 N. Y. 269, 277; *Canal Appraisers v. People*, 17 Wend. 571; *Van Zandt v. Mayor etc.*, 8 Bosw. 375.

These cases establish the absolute power of the city to improve the waterfront for the benefit of navigation, free from any interference by the riparian owner, whose sole right as against the state or its municipal grantee, as the trustee for the public, is the pre-emptive right to purchase, in case of a sale, when conferred by statute. While such are the strict powers of the corporation, in practice, it has used them with that forbearance and moderation that is naturally expected of government, whether state or local, acting for the benefit of all the inhabitants. There is no evidence in this case that the corporation intended to use any part of the lands in question for its private advantage, or for any purpose except to aid the commerce of a great city, and it was admitted by the learned counsel for the corporation in his argument of this appeal that the defendants could not lawfully use these lands except for commercial purposes.

The elementary writers follow the authorities cited. Thus, Mr. Gerard, in his valuable work on *Titles to Real Estate*, 77 says, referring to the state of New York: "It has been established in this state by judicial decision that the legislature of the state has an inherent right to control and regulate the navigable waters within the state. . . . The individual right of the riparian owner was considered . . . as subject to the right of the state to abridge or destroy it at pleasure by a construction or filling in beyond his outer line, and that, too, without compensation made": Gerard on *Titles to Real Estate*, 4th ed., 853. See, also, Gould on *Waters*, secs. 138, 143; Angell on *Tidewaters*, 80; Moore's *Foreshore and Seashore*, 533; Hale, *De Portibus Maris*, 85; *De Jure Maris*, 22.



The cases in this state that are relied upon by the plaintiff do not vary the rule established by the line of authorities already referred to. *Rumsey v. New York etc.*, 133 N. Y. 79; 28 Am. St. Rep. 600, while it substantially overthrows the early case of *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, does not pass upon the rights of a riparian proprietor as against the state itself, or one of its political divisions, in improving the waterfront of a great port for important public purposes. It simply decided that an owner of land on a public river can recover damages from a railroad company for building an embankment across his waterfront and depriving him of access to the navigable part of the stream. The court, however, was careful to limit its decision to the case then in hand, which was against a private corporation with private interests to serve, and to declare that the "principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the federal constitution." *Saunders v. New York Cent. etc. R. R. Co.*, 144 N. Y. 75, 43 Am. St. Rep. 729, was also against a domestic corporation, organized to make money for its stockholders by conducting the business of a common carrier of passengers and freight. It did not involve the right of the state to promote navigation by furnishing greater facilities for commerce. *Langdon v. Mayor etc.*, 93 N. Y. 129, and *Williams v. Mayor etc.*, 105 N. Y. 419, are not analogous, as they rest upon grants from the state of lands under water, with covenants for the enjoyment of wharfage, <sup>78</sup> acted upon at great expense by the grantee. The fact that no claim for compensation in those cases was made upon any other ground is significant. In *Yates v. Milwaukee*, 10 Wall. 497, much was said that favors the theory of the plaintiff, but all that was decided is, that a wharf built by a riparian owner on the bank of a navigable river in the state of Wisconsin under a statutory permit cannot be declared a nuisance without a judicial trial. The later case of *Barney v. Keokuk*, 94 U. S. 324, held that the public authorities may build wharves and make other improvements necessary to navigation below high-water mark upon navigable waters in the state of Iowa without the consent of the adjacent proprietor and without making him compensation. In other states some of the authorities are in accord, while others are opposed to

the rule adopted in this state: *Stevens v. Patterson etc. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Payne v. English*, 79 Cal. 540; *Hess v. Muir*, 65 Md. 601; *Eisenbach v. Hatfield*, 2 Wash. 236; *Ladies' etc. Soc. v. Halstead*, 58 Conn. 144; *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219; *Parker v. West Coast Packing Co.*, 17 Or. 510. The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the state and in others to the riparian proprietors. This also accounts for the want of harmony in the federal courts, as they follow the courts of the state where the case arose, unless some question arises under an act of Congress: *St. Louis v. Myers*, 113 U. S. 566; *Barney v. Keokuk*, 94 U. S. 324, 340; *Willson v. Black Bird etc. Co.*, 2 Pet. 245. The only limitation that is placed by the courts of the United States upon the power of the several states over lands covered by tidewater within their respective limits is not for the protection of riparian owners, but to protect the public in the use of such waters and Congress in its paramount right to control navigation: *Illionis Cent. R. R. Co. v. Illinois*, 146 U. S. 387. While the case last cited is relied upon by the appellant, it is really of little aid to him, as it simply announced the law of Illinois, but not that of New York. <sup>70</sup> The case of the *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 E. & I. App. 418, also much relied upon by the appellant, is not in point, because it turned upon the construction of the statute rather than upon the common law. In that case, a lessee from the crown of land on the river Thames, including some land under water, claimed damages under an act of parliament, which authorized the construction of an embankment along the river bank in front of his property for the purpose, not of navigation, but of making a new street: 25 & 26 Vict., c. 93. The act required compensation to be made for such damage, if any, as should "be sustained by him by loss of river frontage, or otherwise by reason of such embankment and roadway, or other the exercise of any of the powers of the act." As no claim was made except under the act, which expressly recognized the loss of river frontage as the subject of damages, the case is not regarded as an important authority upon the question now before us, notwithstanding the somewhat sweeping language used in the decision.

While we think it is a logical deduction from the decisions

in this state that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the state, as in *Langdon v. Mayor etc.*, 93 N. Y. 129, and *Williams v. Mayor etc.*, 105 N. Y. 419. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the state as trustee for the public, there is <sup>so</sup> reserved by implication the right to so improve the waterfront as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public. Thus, when the king used to grant an exclusive right of fishing in navigable tidewater, as once he lawfully might, if, in the course of time, the nets or weirs interfered with navigation, they became a nuisance and could be abated as such. The grant was silent upon the subject, yet the courts held that whatever impeded the superior right of navigation was impliedly excepted from the effect of the grant. So, as it seems to me, when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the waterfront for the promotion of commerce and the general welfare. The purpose for which the supreme authority holds the title to lands under tidewater is inconsistent with the power to grant any easement or right to those lands that will prevent it, when the necessities of commerce demand, from "wharfing out" to deep water, so that vessels can load and unload and the interests of navigation be promoted. It is a reasonable inference from the nature of



the grant in question made by Governor Nichols, the circumstances surrounding him when it was made, the pursuits of the grantees, the situation of the port of New York with its growing commerce, that it was well understood by both parties that the gratuitous conveyance was not putting a curb on the commerce of the chief city of the continent for all time. Twenty years later, when his successor granted the tideway to the city of New York, with the right to build thereon, there seems to have been neither complaint nor question from the inhabitants of Harlem. Nearly two centuries had passed before any claim to the tideway was made in hostility to that grant, so far as we are <sup>81</sup> advised. The plaintiff now seeks to establish an easement over the tideway against the city, and, in order to do so, he must also establish it against the English crown as well as the state of New York, and show that the sovereign, as *parens patriae*, alienated a right that was essential to the most important public functions. We think that no such limitation upon the prerogative of the sovereign was intended, and that the conveyance of the uplands in question to a subject should, from public considerations of the highest importance, be held to have been made with the implied reservation of the right to freely improve the navigation of the great seaport, within the general limits of which said uplands were situated. The permanent control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention to that end, and, in the absence of express language the strict construction required by law in favor of the sovereign, as trustee, limits the effect of the grant by reserving or excepting therefrom the right to fill in the land out to deep water and build wharves thereon in aid of navigation and as an indispensable incident to commerce: *People v. New York etc. Ferry Co.*, 68 N. Y. 71. This conclusion makes the riparian rights subordinate to those of the public for commercial purposes and leaves unfettered the commerce of the city of New York. The inconvenience to the riparian owner may, sometimes, be serious, but private convenience must often suffer in order to develop the highest utility of a great waterway. It may be safely assumed that no public authority will make an extreme or oppressive use of its rights or unnecessarily inflict injury upon a citizen.

Aside from the authorities cited and the inferences drawn therefrom, we see no answer to the claim of the defendants that

the Dongan and Montgomerie grants were confirmed by the first constitution adopted in this state. In 1732, the colonial legislature enacted "that, all and singular, letters patent, grants, charters, and gifts, sealed under the great seal of the colony of New York, heretofore made and granted unto the mayor, etc., of the city of New York, be, and are <sup>82</sup> hereby declared to be, and shall be good, valid, perfect, authentic, and effectual in the law against the king's majesty, his heirs and successors, and all and every person and persons whomsoever, according to the tenor and effect of the said letters patent, grants, charters, and gifts": Laws 1732, c. 584.

It cannot, in reason, be doubted that this specific act, confined to grants made to the city of New York, was intended, among other things, to confirm the Dongan and Montgomerie charters, the latter of which was less than two years old when the statute was passed. The effect of that act, standing alone, upon a grant made in violation of Magna Charta, it is unnecessary to now consider, for it was confirmed by the constitution of 1777, which was the result of all the legislative power that the people of the state of New York, untrammelled by any higher law, could exert. The constitution of the United States had not then been adopted, and the laws of England were no longer in force within the state, except as they were continued and confirmed by the constitution of the state. There was no restriction, therefore, upon the power of the people to accomplish whatever could be effected through a fundamental act of legislation. The simple but weighty words of its first section were literally true, when it declared "that no authority shall, on any pretence whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them." By the thirty-fifth section of that constitution such acts of the legislature of the colony of New York as were in force on the 19th of April, 1777, which was the day before the constitution was adopted, were continued in force and made the law of this state. The natural effect of this supreme enactment was to give the force of law to every unrepealed act standing upon the statute books of the colony. But the constitution did not stop there, for by the next section it indirectly confirmed all grants of land made by the king, or by persons acting under his authority, prior to the fourteenth day of October, 1775, by providing "that all grants of land within this state made by the king of Great Britain, or by persons acting under

his <sup>83</sup> authority, after the fourteenth day of October, 1775, shall be null and void; but that nothing in this constitution contained shall be construed to affect any grants of land within this state made by the authority of the said king or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day." When the two successive sections, from which quotations have been made, are read in connection with the act of 1732, and in the light of the notoriety of the Dongan and Montgomerie charters, we think it was the intention of those who adopted our first constitution, which did not require compensation for private property taken for public use, to ratify and confirm those grants, made for commercial purposes of the highest importance, and so essential to the prosperity of the city of New York.

If we have reasoned accurately thus far, the claim of title by the plaintiff, through alluvion or accretion, cannot be sustained. The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as the ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water and making it dry: *Mulry v. Norton*, 100 N. Y. 426, 432; 53 Am. Rep. 206; *Halsey v. McCormick*, 18 N. Y. 147; *Angell on Tidewaters*, 71; 1 Am. & Eng. Ency. of Law, 2d ed., 467. The city was not a wrongdoer in filling up the waterfront and constructing piers, as its action was justified by its ancient charters as well as by legislation, to which there is no constitutional objection. The land thus made, without trespassing upon the rights of any one, did not become the property of the plaintiff through accretion, but remained the property of the city for the benefit of the public as dry land, just the same as when it was land under water. It is claimed that *Steers v. Brooklyn*, 101 N. Y. 51, is in conflict with these views. In that case, however, the city of Brooklyn had wrongfully built a pier in front of plaintiff's premises, and it was held that the pier by accretion became added to the plaintiff's land in so far as it was in front thereof. Steers owned to the water line, and the city of Brooklyn, which had no ownership in the shore <sup>84</sup> waters, as they had never been conveyed to it, had no right to build a pier in front of his premises. It was, therefore, a trespasser in thus building the pier and shutting him off from the water privileges which before he had enjoyed as an easement to his bulkhead, and which he had a right to use as against the city of Brooklyn and all



the world except the state, or its lawful grantee, acting for the public. An increase owing to the action of a wrongdoer is an exception to the doctrine that to gain title by accretion the growth must be by imperceptible degrees and through natural causes. *Steers v. Brooklyn*, 101 N. Y. 51, stands upon that exception and has no application to the case now before us. Here the increase was neither imperceptible nor unlawful, and hence the plaintiff took nothing therefrom, and, as we think, the defendants can be deprived of nothing thereby.

We have examined with great care all of the exceptions relied upon by the appellant, but we find none calling for a reversal, and the judgment should, therefore, be affirmed.

All concur, except Gray, J., absent.

Judgment affirmed.

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**BOUNDARIES—TIDE WATERS.**—There is a strong array of authority in favor of the strict application of the common-law rule that only those rivers in which the tide ebbs and flows are to be regarded as limiting adjoining grants to high-water mark, and that in all other streams, whether large or small, the *filum aquae* is the boundary of lands on either side: Monographic note to *Arnold v. Mundy*, 10 Am. Dec. 385, 386. See monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63, on waters as boundary lines.

**WATERS—LANDS ADJOINING AND BENEATH NAVIGABLE WATERS—RIGHTS OF OWNERS.**—A riparian owner has nothing but the natural easement of right of access over lands beneath navigable waters, and the sovereign or state owns the lands under the waters subject to such easement, and has the right to put them to any use consistent with the exercise of the easement on the part of the riparian proprietor. The latter cannot so exercise his right to a passage to the channel as to destroy or unreasonably interfere with the right of the sovereign to put its own lands to such use as it may think proper: *Hedges v. West Shore R. R. Co.*, 150 N. Y. 150; 55 Am. St. Rep. 660, and note. The disposition of lands lying under such waters is a question for the several states to determine for themselves; and each state has power to convey lands so submerged and held by the state, when the conveyance will not impair the remaining public interest in the lands and waters: *People v. Kirk*, 162 Ill. 138; 53 Am. St. Rep. 277, and monographic note.

**WATERS AND WATERCOURSES—RECLAMATION OF LAND COVERED BY WATER.**—The title to land covered by tidal and other navigable waters is discussed in the monographic note to *People v. Kirk*, 53 Am. St. Rep. 289-300. See, also, note to *Miller v. Mendenhall*, 19 Am. St. Rep. 232, 233.

**FAIRCHILD v. EDSON.**

[154 NEW YORK, 199.]

**CORPORATIONS, VOID BEQUEST OR DEVISE TO CAN-**  
**NOT BE HELD BY THEIR OFFICERS.**—If a will provides that if for any cause any society or corporation shall be unable to take the legacy intended for it, then such legacy is bequeathed to its president or chief executive officer, by him to be applied to the uses and purposes of such society or corporation, the trust thus attempted to be created is within the statute condemning as unlawful every restraint of the absolute ownership of property not measured by lives in being, and also because it involves a bequest to societies unincorporated or otherwise incapable of taking.

**WILLS, BENEFICIARIES, DESIGNATION OF, WHAT NECESSARY.**—The beneficiaries in a will must be so designated that if the executors or trustees to whom the fund is given should die before the execution of the trust, the court could distribute the fund among the persons entitled thereto.

**WILLS, BEQUEST OF A FUND TO EXECUTORS TO BE DIVIDED BY THEM.**—A bequest to the testatrix's executors of a fund to be divided by them among such religious, benevolent, and charitable societies of the city of New York and in such amounts as shall be fixed by them with the approval of W. R. H. is void, because the beneficiaries are not so designated that the court could execute the trust if the executors should refuse to do so, or should all die before such execution.

**WILLS—BEQUEST TO EXECUTORS, WHEN ABSOLUTE.** A bequest to executors of all legacies which should lapse, fail, or for any cause not take effect, stating that, in the use of them, the testatrix is satisfied the executors would follow what they believe to be her wishes, that she imposes on them no conditions, and leaves the same to them personally without restriction or condition, is an absolute gift to such executors as individuals, and therefore cannot be void as creating a prohibited trust.

**CORPORATIONS—BEQUEST TO WHEN VOID.**—Though a corporation is given power to take, hold, transfer, or convey for the purposes of its incorporation such property as may thereafter be devised or bequeathed to it, such devises and bequests are subject to the general statute declaring void devises or bequests to corporations made within two months prior to the death of the testator.

**RES JUDICATA.**—A judgment determining that certain executors took property bequeathed to them absolutely and free from any trust or condition is not conclusive in a subsequent proceeding to fasten a trust upon such property in favor of the legal representative or the next of kin or heir at law.

**APPELLATE PRACTICE, QUESTION OF FACT WHICH MAY NOT BE REVIEWED.**—If there is any evidence to support the conclusion of the subordinate court respecting an issue of fact, it cannot be reviewed by an appellate court having jurisdiction of questions of law only.

**WILLS, TRUSTS, ESTABLISHING BY EXTRINSIC EVIDENCE.**—If a testatrix bequeaths property to her executors, saying in her will that she gives it to them without restriction or condition, and that, in the use of the same, she believes they will carry out her wishes, extrinsic evidence is admissible to prove that such executors, or some of them, had an understanding with her that the property so bequeathed should be given by them to certain religious and charitable societies to which she could not give it, because her

death would probably occur within less than two months after the execution of her will. Such understanding being proved, the property so devised or bequeathed must, as against persons accepting it with notice, be deemed held for the next of kin.

**WILLS.—A SECRET TRUST HAVING FOR ITS OBJECT THE CIRCUMVENTION OF THE STATUTE** prohibiting a devise or bequest to religious or charitable societies within a time specified prior to the death of the testator is void, and the trustee may be declared to hold the property for the next of kin of the testator.

**WILLS—SECRET TRUST—UNDERSTANDING BETWEEN A TESTATRIX AND ONE OF SEVERAL LEGATEES.**—If property is devised or bequeathed to several as tenants in common, because of an understanding between the testatrix and one of them that such property shall be held as a secret trust for the benefit of religious and charitable societies, the legatees who do not participate in the understanding are not bound by it, and can therefore retain their share of the legacies.

**WILLS—SECRET FORBIDDEN TRUST, TITLE, WHEN VESTS IN THE TRUSTEE AND FOR WHAT PURPOSES.**—If a will devises or bequeaths property to executors to hold without limitation or condition, but the action of the testatrix is induced by an understanding or promise that the property should be held as a secret trust for religious and charitable societies, the legal title to such property must be regarded as vesting in the executors, to be held by them for the next of kin.

An action was brought by the executors of Mary A. Edson at the request of her brother and sole heir at law for a construction of her will and a determination of the validity of certain clauses therein and of the second codicil thereto. This heir died pendente lite, and the suit was revived in favor of his widow, Margaret B. Edson. The will in question was executed on the 2d of May, 1890, the first codicil on the 22d of the same month, and the second and third codicils five days later, and two days after the execution of the last codicil, the testatrix died, leaving an estate of more than a million dollars, in value. She made certain specific bequests in her will, after which she left one-third of her estate to her brother for life with the power of appointment in him. The balance she gave, or attempted to give, to charities. By the fourth clause of her will she declared: "If, by reason of any error in name or description, a question shall arise as to any beneficiary intended by me to be named, whether in my will or in any codicil, I direct such question to be determined by my executors. If, by reason of want of incorporation, or for any other cause whatsoever, any society or institution named in my will or in any codicil shall be unable to take the legacy intended for it, I give and bequeath such legacy absolutely to the person who shall be president of such institution or society, if it has a president, and if not, to the person who shall be its treasurer, if it has a treasurer, and if not, to the person who shall be its chief executive



officer, to be by him applied to the uses and purposes of such institution or society." The fifth clause declared: "The rest, residue, and remainder of my estate not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious, benevolent, and charitable societies of the city of New York and in such amounts as shall be fixed or appointed by them, with the approval of my friend, the Rev. Dr. William R. Huntington, if living. If, for any reason, any legacy or legacies left by my will or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect, either in whole or in part, I give and bequeath the amount which shall lapse, fail, or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely, and without limitation or restriction." The second case involved an appeal by Margaret B. Edson individually and as testatrix of her deceased husband from a judgment of the appellate division of the supreme court entered December 11, 1896. This action was one brought to establish a constructive trust claimed by the plaintiff to exist under the provisions of the will of Mary A. Edson. The special term found that no such trust existed, but, on appeal, the appellate division adjudged that as against the executor, John A. Parsons, one-third of the residuary estate undertaken to be given him by the will did not vest in him, and that as to such third Mary A. Edson died intestate, and the executors were directed to pay such third to the next of kin.

Treadwell Cleveland, Joseph H. Choate, Daniel L. Smith, and Philip Sidney Dean, for Margaret B. Edson, individually and as executrix, appellant in both cases.

James C. Carter, for corporations, appellants and respondents in both cases.

David B. Ogden and Edward W. Shepard, for executors of Mary A. Edson, deceased, et al., appellants and respondents in both cases.

S. P. Nash, for the Cathedral of St. John the Divine et al., appellants and respondents in both cases.

<sup>209</sup> BARTLETT, J. It has been deemed advisable to consider in one opinion the two cases presented by these appeals,

although they were argued separately and involved very different questions.

The first action was brought by the executors of the will of Mary A. Edson, deceased, for the purpose of obtaining a judgment construing and determining the validity of certain provisions of her will and second codicil.

The court below held, upon the face of the will, the final residuary clause valid which bequeathed to the persons named as executors, personally and absolutely and without limitation or restriction, any legacy, either pecuniary or residuary, which had lapsed or failed, or for any cause had not taken effect in whole or in part.

The second action was instituted by the brother of the testatrix, as her sole heir at law and next of kin, to establish a constructive trust under the provisions of the will and second <sup>210</sup> codicil, taken in connection with certain extrinsic facts established, as it is claimed, at the trial.

The plaintiff in this latter action died since it was begun, and this appeal is prosecuted by his executrix in her representative capacity and individually.

The second action proceeds upon the assumption that the first was properly decided, as the theory upon which it rests is that the bequest to the individuals named as executors, personally, is valid on the face of the will, but that a court of equity, by reason of extrinsic facts, will lay hold of the legacy in the hands of the individual legatee and impress upon it a trust, in order to do justice in the premises.

We will now consider the appeal in the first action, which deals with the validity of the will upon its face. It seems to be practically conceded in the briefs submitted that the provision of the will giving the legacy of an unincorporated society, or of a society unable to take for any other cause, to its chief executive officer to its uses and purposes, is void.

Such an officer would take in trust, notwithstanding the fact that the testatrix bequeaths the legacy "absolutely," as she provides it is held "to be applied to the uses and purposes of such institution or society." This trust is within the condemnation of the statute as creating an unlawful suspension of the absolute ownership of personal property not measured by lives (*Cottman v. Grace*, 112 N. Y. 299), and also involves a bequest to societies unincorporated or otherwise incapable of taking,

which cannot be sustained: *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53.

This leaves two principal questions to be considered:

The first arises under the following provision of the will as modified by the second codicil, which was held valid by the special term and void by the general term: "The rest, residue, and remainder of my estate, not disposed of by my will or by any codicil, I give and bequeath to my executors, to be divided by them among such incorporated religious, benevolent, and charitable societies of the city of New York, and in such amounts as shall be fixed or appointed by them, <sup>211</sup> with the approval of my friend, the Rev. Dr. William R. Huntington, if living."

It is urged that the testatrix has sought to create a trust which is void for the reason that she has not designated her beneficiaries, as a class, with certainty.

It has been repeatedly held by this court that the class of beneficiaries should be so designated and determined that if the executors or trustees to whom the fund is given should die before the execution of the trust, the court could distribute the fund equally among the members of the class: 1 Rev. Stats. sec. 100, p. 734.

The true test to be applied to this provision of the will is, Could the court execute this trust if the executors and the Rev. Dr. Huntington had refused to do so, or were dead?

The beneficiaries are described to be "such incorporated religious, benevolent, and charitable societies of the city of New York" as shall be appointed by the executors, with the approval of the Rev Dr. Huntington, if living.

If the supreme court were called upon to ascertain the beneficiaries designated as objects of this trust, and to decree equal distribution of the fund to all of the class named, we are of the opinion it could refuse to proceed on the ground that it would be impracticable to make a complete list of the incorporated religious, benevolent, and charitable societies of the city of New York.

If the bequest were confined to incorporated religious societies of all denominations, it would call upon the court to perform a very difficult task, but add to the list the incorporated charitable and benevolent societies of every kind, unlimited by creed or other restriction, and the class becomes so



indefinite and uncertain that the court would find it impossible to execute the trust.

The validity of this provision of the will we are now considering was argued before us with great learning and ability, reviewing the law prior to the Revised Statutes creating our present system of trust powers governing trusts of personal as well as real property, and urging that in *Prichard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9, and kindred cases, the statute had been so strictly construed as to prevent the courts from ascertaining the intention of testators, and, in cases where gifts were to very large classes of charities, resulted in defeating the scheme of the will in that regard on the ground that the bequest was indefinite as to the class sought to be designated.

We are also reminded that the evil had become such a public reproach that the legislature had intervened in a manner that affords only an imperfect remedy: Laws 1893, c. 701.

The obvious answer to this argument is, that while it would be entitled to serious consideration when addressed to a body seeking to frame a statute creating trust powers, so as to carry out to a greater extent than under the present system the intention of testators, it must necessarily be without force in this court, where the invalidity of the provision under review, read in the light of existing statutes, is established by a number of cases which are carefully reasoned both on principle and authority: *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9; *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748; *Fosdick v. Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487; *People v. Powers*, 147 N. Y. 104.

It is unnecessary to go over the facts of these cases in detail, or to consider the principles and authorities upon which they rest, as it would be mere repetition. We agree with the learned general term that this provision of the will is void for indefiniteness.

The second question to be considered arises under the following provision of the will and second codicil, viz: "If, for any reason, any legacy or legacies left by my will, or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect, either in whole or in part, I give and bequeath the amount which shall lapse, fail, or not take effect absolutely to the persons named as my executors. In

the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, <sup>213</sup> no conditions, leaving the same to them personally and absolutely, and without limitations or restrictions."

The special and general terms have sustained the validity of this clause, holding that the executors took thereunder as individuals an absolute gift of all the property of testatrix not validly disposed of by the will and codicils.

It is insisted by the respondents, in support of this provision, that it is impossible to raise any question of interpretation; that the language is so clear as to exclude all doubt; that to ascertain the meaning of the clause we have only to read it; that the testatrix anticipated that the intention to create a trust might be imputed to her, and added language which prevents such a construction.

It certainly seems reasonable to assume that, where the court is considering the face of the will only, and a testator has said in so many words that he did not intend to create a trust, a conclusion could not be reached that he did intend it.

This case is not to be distinguished from that of *In re Keleman*, 126 N. Y. 73. The language of the codicil in that case was as follows: "Doubts having arisen as to the validity of the bequests made for charitable purposes in my said will, I hereby modify said will, dated February 18th, 1889, by making my friend Townsend Wandell my residuary legatee and devisee, and hereby request him to carry into effect my wishes with respect thereto, but this is not to be construed into an absolute direction on my part, but merely my desire."

Judge Finch, in writing the opinion of the court, said: "We think it very clear that the bequest was absolute to the legatee, and not upon any trust at all. . . . She leaves him absolute owner, and free to do as he shall choose. She puts upon him no obligation, legal or equitable, but contents herself with the bare expression of a wish which she hopes will influence his free agency. And so the bequest was absolute, and, therefore, valid on the face of the will": See, also, *Riker v. St. Luke's Hospital*, 35 Hun, 512; affirmed, 102 N. Y. 742; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.

<sup>214</sup> We have carefully considered the very able briefs of the appellants which refer us to numerous authorities in England and this country, where the language of the will has been held to be mandatory and to import a trust. Every will is, to a cer-

tain extent, *sui generis*, and the trend of modern authority is to assume that the testator means precisely what he says, and that he is entitled to have attributed to his language its plain and ordinary meaning. Judged by this rule, the final residuary clause in the will before us created no trust upon its face.

There is a further question to be considered.

The special term held that the legacies to certain corporations incorporated under the act of 1848, chapter 319, or to which that act is applicable, were void, as the will was executed less than two months before the death of the testatrix. The general term added to the list of these corporations, as set forth in the judgment of the special term, the names of three other corporation legatees, viz., Society of St. Johnland, Orphan House of the Holy Saviour at Cooperstown, Otsego county, New York, and the New York Protestant Episcopal City Mission Society, their legacies having been upheld by the special term.

The society of St. Johnland alone has appealed to this court. This society was organized under the Laws of 1848, chapter 319, but claims exemption under the provisions of Laws of 1872, chapter 562. This act authorized the society "to take, hold, transfer, and convey, for the purposes of its incorporation, in addition to the property now held by it, all such other property, real and personal, as has heretofore been given, devised, bequeathed, subject to all provisions of law relating to devises and bequests by last will and testament, or conveyed to it, or may hereafter be given, devised, bequeathed, or conveyed to it by any person or persons whomsoever," etc.

It is urged on behalf of this society that the act quoted exempts it from the provisions contained in the general act of 1848, rendering charitable bequests void when made within two months of the testator's death, and that unless such a meaning is given the statute is without purpose.

<sup>215</sup> The act is inartificially drawn, but it obviously permits this society to take and hold property without limit as to amount, subject to all provisions of law relating to devises and bequests by last will and testament. This qualifying clause was evidently inserted to prevent releasing the society from the restrictions contained in the general act of 1848.

It, therefore, follows that the legacy to the Society of St. Johnland is void.

The judgments and orders of the general term modifying the judgment of the special term in the first action are affirmed.



with costs to all parties appearing by separate attorneys in this court to be paid out of the estate.

We now come to the cross-appeals in the second action brought to establish a constructive trust as to the property bequeathed personally and absolutely to the three persons named as executors in Miss Edson's will.

The special term dismissed the complaint as to all the persons named as executors, and the appellate division affirmed as to two of them, but as to John E. Parsons adjudged that the one-third of the residuary estate given to him be paid to the next of kin of testatrix.

We are met at the threshold of this appeal by the suggestion that the judgment in the first action is a complete bar to this suit.

We agree with the reasoning contained in the opinion of the learned appellate division on this point, and hold that the judgment in the first action is not a bar. As already pointed out, the first action dealt with the validity of the will upon its face, and adjudged that under the final residuary clause the legatees took as individuals their respective legacies absolutely and without limit or restriction. In the second case, the plaintiff rests upon that adjudication as the foundation of her action, and invokes the aid of a court of equity to deal with the legacies in the hands of the individual legatees, insisting that by reason of extrinsic evidence a trust should be impressed thereon for the benefit of the legal representative of the next of kin or heir at law. <sup>216</sup> The statement of this situation is a complete answer to the suggestion of *res adjudicata*.

Approaching the merits of this case, we find that Miss Edson, prior to 1884, inherited a fortune of about one million two hundred thousand dollars, and in that year executed a will in which her brother was made her residuary legatee in the event she survived her sister.

In May, 1890, and during her last illness, she executed the will and second codicil now before the court—the will on the second day of that month, the first codicil on the twenty-second, the second and third codicils on the twenty-seventh, and she died on the twenty-ninth.

The main contention of the plaintiff is, that the second codicil, which contains the last residuary clause as finally amended, was executed by the testatrix under the shadow of death and within two days of her decease; that she was then advised by

her counsel that her new testamentary scheme to devote her estate largely to religion and charity was likely to fail as it was apparent that her survival for sixty days was impossible; that in order to avoid the provisions of the law in this regard, the final residuary clause was devised so that legacies to the societies resting under the inhibition of the general act of 1848 should be paid to them by the individual legatees who had assumed a secret trust to carry out the wishes of the testatrix to that effect. These assertions of the plaintiff are fully denied, and upon this issue the parties went to trial.

It is important to have a clear understanding as to the manner in which the question of fact is presented to this court and the limits of our power in the premises. The trial court dismissed the complaint as to the residuary legatees Parsons, Bartow, and Fairchild. The appellate division affirmed this judgment as to the two latter and reversed it as to Mr. Parsons and ordered a final judgment against him.

The defendants insist that the facts are undisputed and that no question of fact is presented here; that there is only a question of law as to whether the facts show a promise on the part of Mr. Parsons.

<sup>217</sup> The appellate division state in their order that the reversal was on the law and the facts, and say in their opinion that they concluded, from all the facts, that when the will was executed Mr. Parsons did have an understanding with Miss Edson as to her wishes with regard to this property.

Whether there is a question of fact in a case is always a question of law depending possibly upon a conflict of evidence and possibly upon conflicting inferences which may be drawn from uncontradicted evidence: *Otten v. Manhattan Ry. Co.*, 150 N. Y. 401; *Salt Springs etc. Bank v. Sloan*, 135 N. Y. 383, 384; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.

In the case before us, we have uncontradicted evidence from which conflicting inferences may be drawn. In *Otten v. Manhattan Ry. Co.*, 150 N. Y. 400, Judge Vann states the rule governing this question.

"It is clear that we have no power to review a question of fact in a civil case, and that our jurisdiction is limited both by the constitution and the statute to questions of law. When the appellate division affirms unanimously upon the facts, we cannot look into the record to see whether there was any evidence to sustain the findings, for the constitution forbids it.

When the appellate division reverses upon the facts, there is no constitutional inhibition, and a question of law arises as to whether there was any evidence to support the view of that court. If it appears that there was any material and controverted question of fact, the decision thereof by the appellate division is final. We cannot now review a decision upon a question of fact when the judgment is of reversal any more than we formerly could when it was of affirmance, except that if there is no material question of fact appearing in the record we have jurisdiction to review, because in that case the appellate division would have had no jurisdiction to reverse."

It, therefore, comes to this, that if there was any evidence to support the conclusion of the appellate division as to Mr. Parsons, we are not at liberty to weigh it or review it, but the decision below is final and binding upon this court.

<sup>218</sup> In view of the earnest insistence of the learned counsel for defendants that the conclusion of the appellate division in this regard is wholly unsupported by evidence, we have examined this record with the greatest care and reached the conclusion that there is evidence to sustain the decision below as to Mr. Parsons.

We quote the final residuary clause in this connection: "If, for any reason, any legacy or legacies left by my will, or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect, I give and bequeath the amount which shall lapse, fail, or not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely and without limit or restriction."

Considering the facts established at the trial, it cannot be properly said that there was no evidence to sustain the conclusion of the appellate division to the effect that this residuary clause was a last effort, so far as Mr. Parsons was concerned, to aid his dying client in carrying out a testamentary scheme that was about to be defeated to a very large extent by her immediate death, and that he took his legacy resting under the implied promise to carry out her wishes. The express promise in words is not necessary—silent acquiescence and tacit consent have all the force and effect of a promise solemnly made in the presence of witnesses: *O'Hara v. Dudley*, 95 N. Y. 412; 47 Am. Rep. 53.



The evidence certainly discloses a state of facts from which opposing inferences may be drawn. The following are some of the facts: That Mr. Parsons was and long had been the legal adviser of the testatrix; that the will and codicils were prepared under his supervision; that he attended to the execution of this second codicil within forty-eight hours of his client's death with more than usual care reading it to the testatrix and stopping at the end of each clause until she nodded assent; that shortly after her death <sup>219</sup> the residuary legatees met at Mr. Parsons' office and joined in a deed of gift, with the approval of Rev. Dr. Huntington, which provided, among other things, for the payment of legacies to all the corporations named in the will and codicils that had lapsed for any cause; that Dr. Huntington testified that he paid regard to what he understood to be the wishes of Miss Edson, and learned what they were from the executors.

We have no power, as before stated, to weigh or review these facts, but decide that there was evidence to support the conclusion of the appellate division as to Mr. Parsons.

Starting out with this conclusion, based on the facts, the judgment against Mr. Parsons is sustainable on principle and authority. The effect of his agreement was to defeat the policy of the state as embodied in the general act of 1848, rendering void all legacies to charitable uses contained in wills executed less than two months before death.

It has long been considered in accordance with a sound public policy to guard against those improvident dispositions by last will and testament which are so often the result of a weakened mental condition, due to severe illness, and the fear that comes to many in the hour of death.

It needs no argument to demonstrate that a secret trust, having for its object the circumvention of this statute, is void.

This being so, a court of equity will not permit the legatee to hold his legacy, but declares a trust in favor of the heir at law and next of kin. This precise question has been so thoroughly considered, and the authorities reviewed at such length by this court in *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53, and *Amherst College v. Ritch*, 151 N. Y. 282, that a discussion on this branch of the case will not be prolonged.

The point is made by one of defendants' counsel that the appellate division, even if right in reversing the judgment as to Mr. Parsons, erred in not granting a new trial.

Section 1022 of the Code of Civil Procedure, as amended in 1895, to take effect January 1, 1896, reads as follows:

"Sec. 1022. The decision of the court or the report of a referee, <sup>220</sup> upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, or the court or referee may file a decision stating concisely the grounds upon which the issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment-roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and, if it awards costs, it must designate the party to whom the costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the appellate division of the supreme court shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant."

The words "or grant to either party the judgment which the facts warrant" are new. It is urged by appellants that these words confer no new power, and that the question as to what were proper cases for the exercise of this jurisdiction was not changed by this amendment.

We are of opinion that the ordering of final judgment in this case against Mr. Parsons was justified by the condition of the record. It is apparent that the facts were all disclosed, and on a new trial they could not have been changed.

The remaining question is, whether the secret trust affects all the property in the hands of the three legatees under the residuary clause.

The appellate division held that the legatees took as tenants in common, and that the promise of one made in his behalf with the testatrix did not bind his cotenants.

In *O'Hara v. Dudley*, 95 N. Y. 410, 47 Am. Rep. 53, Judge Finch states that the legatees in that case took absolutely, but as joint tenants. At pages 412 and 413 the learned judge says: "So far, <sup>221</sup> then, as McCue is concerned he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates, by asserting

its necessity and promising faithfully to carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one."

In the case at bar it is conceded that there is no evidence establishing a promise made testatrix, either express or implied, by Bartow or Fairchild. The plaintiff's contention is, that Bartow and Fairchild are bound by the implied promise made by Parsons. In order to escape the force of the distinction taken in *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53, between joint tenants and tenants in common, it is urged that this court in *Amherst College v. Ritch*, 151 N. Y. 282, expressly eliminated in this state the distinction in this class of cases between a joint tenancy and a tenancy in common.

This criticism is inaccurate and the conclusion based thereon unwarranted. There is a very clear distinction between the case cited and the one at bar. In the *Amherst College* case the trial court found that Ritch and Vaughan for themselves and Mr. Bulkley promised the testator, Mr. Fayerweather, that if he would make them the residuary legatees they would do as he desired. The general term held that the facts so found were amply supported by evidence; also, that there was an understanding between Bulkley and the testator that the estate should be disposed of as the latter desired. Under these peculiar circumstances, we held that Bulkley, by accepting the gift, ratified the promise made in his name.

In the case at bar, there is no evidence that the implied promise of Mr. Parsons was made for anyone except himself. In the will and codicil now under consideration, there was no declaration of joint tenancy between the residuary legatees, so under the statute it must be deemed a tenancy in common (1 Rev. Stats. 727, sec. 44) which applies to personal property as well as real estate: *Matter of Kimberly*, 150 N. Y. 90. It follows <sup>222</sup> that there was no error in the appellate division affirming the dismissal of the complaint as to Bartow and Fairchild.

It is freely conceded throughout this case that Mr. Parsons' position has been an honorable one; that his sole object was to carry out the religious and charitable designs of his client, who was in extremis, and that he never proposed to hold the legacy in question for his own benefit in whole or in part.



All this goes without saying, but a court of equity will never permit a testamentary scheme, however meritorious in origin or object, to prevail when it is proved that the testatrix and her residuary legatee have entered into an agreement, express or implied, having for its object the evasion of the statute and the subversion of the public policy of the state.

In conclusion, we call attention to the form of judgment entered up in the appellate division, doubtless through inadvertence, as to the one-third of the estate bequeathed to Mr. Parsons.

It adjudges that it did not pass by Miss Edson's will "to the said John E. Parsons, and that as to the said one-third part of her residuary estate the said Mary A. Edson died intestate." It then directs the executors to pay over the amount to the next of kin.

We have already pointed out that under the judgment in the first action the legacy to Mr. Parsons did pass under the will and second codicil, and that the court, in the exercise of its equitable jurisdiction, lays hold of this one-third of the estate in the hands of Mr. Parsons, individually, as residuary legatee, and impresses thereon a trust in favor of the next of kin. There was no intestacy as to this portion of the estate.

The judgment of the appellate division should be modified so as to conform to these views, and, as modified, affirmed, with costs to all parties appearing by separate attorneys in this court to be paid out of the estate.

All concur.

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**CHARITIES—DEVISES TO UNINCORPORATED SOCIETIES.**—The question as to whether unincorporated societies can receive bequests to charitable uses is a controverted one: Extended note to *Bridges v. Pleasants*, 44 Am. Dec. 101; *Dye v. Beaver Creek Church*, 48 S. C. 444; 59 Am. St. Rep. 724, and note.

**TRUSTS—WHEN UNLAWFUL AS CREATING PERPETUITIES.**—A perpetuity will be no more tolerated when covered by a trust than when it displays itself undisguised in the settlement of a legal estate: *In re Walkerly*, 108 Cal. 627; 49 Am. St. Rep. 97, and monographic note on the rule against perpetuities, page 129. The rule against perpetuities does not apply to trusts for charitable purposes: *Mills v. Davison*, 54 N. J. Eq. 659; 55 Am. St. Rep. 594, and note.

**TRUSTS—NECESSITY FOR DESIGNATED BENEFICIARY.**—A trust without a beneficiary who can claim its enforcement is void, and the objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the claim of the persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487, and

note. The validity or invalidity of a trust cannot be made to depend upon the will of the trustee: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420.

**WILLS—SECRET TRUSTS—WHEN WILL NOT BE CARRIED OUT.**—A testatrix, desiring to leave her estate for charitable purposes, and being advised that she could not effect her design by direct testamentary provision, but only by absolute gifts to individuals, in reliance upon their honor to carry out her purposes, gave the greater part of her estate to her lawyer, her doctor, and her priest by will, absolutely as joint tenants, they promising to observe her instructions. She also signed a letter of instructions directing the bestowal of the estate on intermediate persons and charities of their selection in perpetuity. It was held that the legatees took no absolute estate, and that the gifts to charity being repugnant to the statute against perpetuities, the estate was held in trust for the heirs and next of kin of the testatrix: *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53.

**APPEAL—QUESTION OF FACT NOT REVIEWABLE.**—A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607, and note; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138; 46 Am. St. Rep. 702.

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## PEOPLE v. PURDY.

[154 NEW YORK, 439.]

**PUBLIC OFFICE, ELIGIBILITY TO.**—If a statute declares that no trustee of a school district shall be eligible to the office of supervisor of any town or city, a person holding the former office is not eligible to an election to the latter. He cannot, by resigning after his election, become entitled to the office for which he was ineligible when elected.

John M. Digney and Wilson Brown, Jr., for the appellant.

William H. Robertson, Isaac N. Mills, and Odle J. Whitlock, for the respondent.

**441 O'BRIEN, J.** In an action in the nature of a quo warranto, brought by the attorney general against the defendant to oust him from the office of supervisor of the town of North Salem, the court below, reversing the judgment of the trial court, held that the defendant was not entitled to the office. It is undisputed that, at the town meeting held in March, 1896, the defendant received the largest number of votes cast by the electors, and, if they could lawfully choose him to discharge the duties of the office, he was clearly elected.

On the day upon which the town meeting was held and the votes cast, the defendant held the office of trustee of one of the school districts of the town, but after the result of the

election was declared, he resigned that office, qualified as supervisor, and entered upon the discharge of the duties of that office.

Section 50 of the town law enacts that no trustee of a school district shall be eligible to the office of supervisor of any town or ward in this state. The trial court held that this <sup>442</sup> disqualification related to the holding of the office and not to the election. That while the defendant was ineligible to hold the office of supervisor until his resignation of the office of school trustee, yet he was capable of receiving the votes of the electors and of being elected to the office at the town meeting, and that his subsequent resignation of the office of trustee removed every objection to his right to enter upon the duties of supervisor and hold that office. The appeal, therefore, presents the question with respect to the meaning and proper construction to be given to the disqualifying words of the statute. This question has been so thoroughly and ably discussed in the learned opinion below, and the conclusion that a school trustee is not only incapable of holding the office of supervisor, but also of being elected to that office, is so well supported by the reasoning based upon the ordinary meaning of the word "eligible" and the general current of judicial authority, that very little remains to be said upon the subject. The opinion covers the whole ground, and the result, it will be seen, is well sustained by reason and authority.

We have but one suggestion to add to what has been there so well stated. A public statute relating to the qualifications of public officers should never be so construed as to produce inconvenience or to promote a public mischief or to render the action of the voters at the election abortive. It should, in every case when the language will fairly permit, be given such a construction as to enable the electors to act intelligently, and to accomplish with as much certainty as practicable the purpose that they may have in view. If it be held that the disqualification of the statute applies only to the holding of the office, and not to the capacity of the candidate for election, then the electors can never know when voting for a school trustee for the office of supervisor whether they will succeed in filling the office or not. Though the action of the electors may be unanimous, the result must depend upon the future action of the candidate himself. Unless he resigns as trustee, there has practically been no election, and the office is left vacant, though the people in-



tended to fill it. The vote in such a case <sup>443</sup> may be said to be conditional upon the resignation of another office by the candidate voted for. He may refuse or fail to resign, and then the action of the voters is nugatory. The statutes for filling vacancies might not apply to such a case, since it cannot be said that the person who received the votes of the people ever filled the office or could fill it. It is simply a failure to elect anyone to the place.

The statute, we think, does not contemplate that a person who is disqualified to hold the office may, nevertheless, be lawfully elected upon the chance that subsequently he may, by his own act, or by the happening of some event, remove the disqualification, and thus become entitled to fill it. The better rule is, that the electors, in making the choice, must be confined to the selection of such persons only as are not then under any legal disqualification to exercise its powers and perform its duties. The electors can then know that when the choice is made and legally declared the object for which the election was held has been accomplished, and that there is no legal obstruction in the way to prevent their will, as thus expressed, from becoming effective.

The judgment was right and must be affirmed.

All concur.

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**OFFICERS—ELIGIBILITY OF.**—Eligibility to office means qualified to take office at the time when the official term begins, and does not require such qualification to exist at the time of the election to such office: *Kirkpatrick v. Brownfield*, 97 Ky. 558; 53 Am. St. Rep. 422, and note. Where a statute provides that "no person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county holds stock, shall be eligible to the office of county commissioner," the word "eligible" signifies "legally qualified to hold office," and does not comprehend the two meanings, "capable of being elected" and "capable of holding office": *Demaree v. Scates*, 50 Kan. 275, 34 Am. St. Rep. 113, and note. See *Privett v. Bickford*, 28 Kan. 52; 40 Am. Rep. 301.

## MATTHEWS v. AMERICAN CENTRAL INSURANCE CO.

[151 NEW YORK, 449.]

**INSURANCE—CONSTRUCTION OF POLICY.**—Where the meaning of a policy of insurance is doubtful, it should be construed most favorably to the insured. If a literal construction would lead to manifest injustice to the insured, and a liberal, but still reasonable, construction would prevent injustice by not requiring an impossibility, the latter should be adopted.

**INSURANCE.—DEATH OF PERSON WHOSE PROPERTY IS INSURED** does not avoid the policy, and though it provides that the insured shall give immediate notice of the loss and within sixty days sign, verify, and deliver proofs thereof, this provision must, after such death, be given a reasonable construction, and the right to indemnity is not lost by failure to comply with it literally owing to such death and to the absence of persons qualified to give such notice and make such proofs.

**INSURANCE—DEATH OF THE INSURED, FAILURE TO GIVE NOTICE AND MAKE PROOFS OF LOSS BECAUSE OF.**—It is incumbent on those interested in a policy insuring property against destruction by fire to make reasonable efforts to see that the covenants thereof are kept, and within reasonable time to use such agencies as the law provides in order that they may be kept, if possible. If the insured has died, and no executor has been appointed, because of a contest of the will of the decedent, this does not relieve the persons interested from the necessity of acting. The heirs or next of kin should, within a reasonable time, give notice of the loss and make the proof stipulated for in the policy, or procure the appointment of a special or temporary administrator to do so; and if no notice of loss is given until more than two years after the death of the insured, the insurer is relieved from liability, if the policy stipulates that the insured shall give notice immediately after the loss and make proofs of loss within sixty days.

**INSURANCE, NOTICE AND PROOFS OF LOSS, WHO MAY GIVE AND MAKE.**—If a temporary or special administrator is authorized to collect choses in action, such authority includes the power to do whatever is requisite to perfect the chose in action, so that such collection may be enforceable, and if it is a policy of insurance, he may give the notice and make the proofs of loss when it stipulates, that, in the event of loss, the insured shall give immediate notice in writing to the insurer and furnish proofs of loss, signed and sworn to by the insured.

**CONTRACTS.—TO EXCUSE NONPERFORMANCE** it must appear that the act to be done could not by reasonable means have been accomplished. Mere difficulty of performance is not enough.

**INSURANCE—DELAY IN BRINGING SUIT.—THE DEATH OF THE INSURED** does not entitle his executor to bring an action long after the time stipulated for in the policy, though the appointment was delayed by the pendency of proceedings resisting the probate of the will, if, during those proceedings, those interested in the estate might have procured the appointment of a special or temporary administrator and compelled him to bring an action upon the policy within the time agreed upon therein.

**APPELLATE PRACTICE.**—The appellate division of the supreme court of New York cannot dismiss a complaint on the merits. Its only function is to grant or deny the motion for a new trial and to order judgment accordingly.

Action upon a policy of insurance issued in August, 1889, to Mrs. Caroline Silvernail, insuring her dwelling-house, barn, and produce therein against damage by fire for the term of three years. She died December 2, 1891, leaving a will in which the plaintiff was named as her executor. Its probate was opposed by some of the heirs, and it was not until May 15, 1894, that the will was admitted to probate and the plaintiff appointed executor. In the mean time, on April 20, 1892, a portion of the property was destroyed by fire. On July 11, 1894, proofs of loss were made and forwarded to the defendant by the plaintiff, and were received on the 23d of the same month and retained without objection. On the 29th of October, 1894, the present action was commenced. The defenses were that the action was not begun within twelve months next after the fire, as provided for in the policy, and that written notice of the loss was not given immediately, nor were proofs of loss furnished within sixty days after the fire, as stipulated for in the policy. The court, on motion of the plaintiff, directed a verdict in his favor, there being no evidence on behalf of the defendant. The exceptions taken by the defendant were sustained by the appellate division by a divided vote, and the complaint dismissed. The plaintiff thereupon appealed.

J. F. Parkhurst, for the appellant.

I. N. Ames, for the respondent.

456 VANN, J. The policy in question provided that, if a fire should occur, "the insured" should "give immediate notice of any loss thereby in writing to" the company, and "within sixty days after the fire" should furnish proofs of loss "signed and sworn to by said insured." It further provided that the loss should not become payable until sixty days after the receipt by the company of the proofs of loss, and that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." By a subsequent clause it was stipulated that, whenever the word "insured" occurred in the policy, it should "be held to include the legal representatives of the insured," and, by a preceding clause, that any change in interest, title, or possession, "other than by death of the insured," should avoid the policy.



As the fire occurred after the death of Mrs. Silvernail, "the insured" at the date of the loss was either the person who, in the course of time, should be appointed by the surrogate to administer upon her estate, or the persons interested in her estate, who expected to share therein: 13 Am. & Eng. Ency. of Law, 221; 21 Am. & Eng. Ency. of Law, 18; *Greenwood v. Holbrook*, 111 N. Y. 465. As "legal representatives" are equivalent to "executors and administrators," where the subject matter or context do not control the meaning, we will first proceed upon the assumption that, on the death of the testatrix, the words "the insured," as used in the policy, referred to the legal representative to be appointed by the surrogate. That person could not, in the nature of things, be known until the appointment was actually made, as, in the case of testacy, the executor nominated might die or decline, and, in case of intestacy, none of the persons entitled to the right of administration might accept the trust. The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view, and hence, when the meaning is doubtful, it should be construed most favorably to <sup>457</sup> the insured, who had nothing to do with the preparation thereof: *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 313; Laws 1886, c. 488; Laws 1892, c. 690, sec. 121.

Moreover, when a literal construction would lead to manifest injustice to the insured and a liberal but still reasonable construction would prevent injustice by not requiring an impossibility, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable and not an unreasonable result: *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 26; 37 Am. St. Rep. 529; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389. Hence, it cannot be held that the policy became of no value upon the death of Mrs. Silvernail, because, at that moment she had, and of necessity could have, no legal representative to give immediate notice of a fire if one had occurred. So, when the fire actually occurred there was still no legal representative to give the notice specified, yet the liberal construction that always obtains with reference to the procedure after a loss does not permit us to hold that the policy became void because, under the circumstances then existing, the notice was not given at once: *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 76. As the policy provides for the effect of death, and includes, under the head of "the in-

sured," the legal representative of the insured, the parties necessarily contemplated a period longer or shorter in duration, depending upon circumstances, when there could be no one authorized to act for the estate. Hence, the covenants that "the insured" should give written notice immediately after the fire, and that within sixty days "the insured" should sign, swear to, and deliver proofs of loss, are to be considered in the light of what may reasonably be presumed to have been within the contemplation of the parties when they entered into those covenants, as to the possibility of literal performance in case of a fire after the death of the original "insured" and before any opportunity to have a legal representative appointed by the surrogate. The words "immediately after the fire," as used with reference to the preliminary notice, and "sixty days after the fire," as used <sup>458</sup> with reference to the proofs of loss, are to be construed, not literally in all cases, but in the light of what was reasonable and possible in the case in hand: *Bennett v. Lycoming etc. Ins. Co.*, 67 N. Y. 274; *Richards on Insurance*, sec. 160. The law does not require impossibilities. The disability to sue, caused by war, has been held to relieve a policyholder from the consequences of failing to bring suit within twelve months after a loss, as required by the policy, because compliance was impossible under the circumstances: *Semmes v. Hartford Ins. Co.*, 13 Wall. 158. The same cause was held for the same reason to legally excuse the nonpayment of premiums upon a policy of life insurance as required by its terms: *Cohen v. New York etc. Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522. Still, as the covenants in question are essential to the safe conduct of the insurance business, in order to enable the insurer to promptly investigate the facts connected with a fire, to provide for paying or defending, or for rebuilding if it so elected, it is incumbent upon those interested in the policy to make reasonable efforts to see that the covenants are kept, and, within a reasonable time, to use such agencies as the law provides, in order that they may be kept, if possible. As was said by this court in *Wheeler v. Connecticut etc. Ins. Co.*, 82 N. Y. 543, 550, 37 Am. Rep. 594, with reference to the failure to pay premiums of life insurance owing to the insanity of the insured and the infancy of the assignees of the policy: "After Vose became insane he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein and to be affected by a failure to perform the condition of the contract.

Although Vose was their guardian, if incapacitated by his insanity a competent person could have been appointed in his place; and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby." Those who expect to share in the proceeds of the policy when paid cannot trifle with the subject nor delay action that would naturally result in compliance with the requirements of the contract. <sup>459</sup> If the appointment of an executor or administrator cannot for any reason be secured with ordinary promptness, it would not be a reasonable construction of the policy to cast all the risk and inconvenience of the delay upon the insurer, provided those interested in the estate could procure the appointment of a temporary representative, who, by taking the necessary steps, could keep the covenants entered into by the insured.

It is provided by section 2670 of the Code of Civil Procedure that, on the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more suitable persons letters of temporary administration, where delay necessarily occurs in the granting of letters testamentary or of administration owing to a contest before the surrogate, arising on an application therefor or for probate of a will, or for any other cause. At least ten days' notice must be given to each party to the proceeding who has appeared, but the period may be shortened to not less than two days by the surrogate upon proof that the safety of the estate requires it. A temporary administrator, thus appointed, "has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of those purposes, he may maintain any action or special proceeding": Code Civ. Proc., sec. 2672. It is further provided that, "where a temporary administrator is appointed, in consequence of a contest respecting a will of real property, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special pro-



ceeding": Code, sec. 2675. While other powers are conferred by statute, or may be conferred by the surrogate, under its <sup>460</sup> authority, upon a temporary administrator, these are sufficient for the purpose of discussing the question now before us.

The will of Mrs. Silvernail embraced both real and personal property, including by specific mention the farm upon which the burned buildings stood, and indirectly the produce destroyed, through the power to sell the same in order to pay pecuniary legacies. The executor was given the right to sell the farm after five years, with power to lease the same in the mean time. The income, after deducting interest and taxes, was to be applied upon the encumbrances, and the proceeds of the sale, after payment of all the debts of the testatrix, were to be divided among her children.

A fire insurance policy, after a loss has occurred, is a chose in action, and a temporary administrator could collect the same and, if necessary, commence an action for that purpose. Whether the proceeds, when collected, would be real or personal property, or both, is unimportant in this case, as the power to collect is the vital fact. That power necessarily implies the further power to do whatever is requisite in order to perfect the chose in action so that collection can be enforced, for the power to do an act includes the power to do all that is reasonably necessary to do it effectively: *Hall v. Lauderdale*, 46 N. Y. 70, 73; *Parker v. Supervisors*, 106 N. Y. 392. Independent, therefore, of the provisions of the statute empowering the surrogate to confer authority upon the temporary administrator in regard to real estate, when there is a contest respecting a will of realty, we think that the right to collect the policy carried with it the right to serve all such notices as the policy required, in order to make it collectible. Hence, it was within the power of the persons expecting to share in the property of the testatrix to do something toward keeping her covenants with the defendant. While it is true that their application, if made to the surrogate, was subject to his discretion, it cannot be presumed that he would have hesitated to appoint a temporary administrator if the facts bearing upon the subject were spread before him that appear in the record now before us: *McGregor v. Buel*, 24 N. Y. 166, 169. <sup>461</sup> Moreover, even if the application, although made in due time and form, had failed, it would have relieved the beneficiaries under the will from the accusation of negligence that is now brought against

them, for they could say in answer thereto, "We have done all that we could." No excuse, sufficient or otherwise, for nonaction was shown, such as absence, insanity, infancy, or want of knowledge that the fire had taken place. The subject of applying for a temporary administrator was under discussion among the heirs while the contest over the will was in progress. Not long after Mrs. Silvernail died, the plaintiff deposited the will with the surrogate, and informed him that he did not want to have anything to do with it, but after the lapse of several months, upon the request of certain creditors of the testatrix, he consented to act, and thereupon proceedings were begun to prove the will. Mrs. Silvernail left three children, each of whom was a devisee or legatee, under the will, and all were of full age and competent to act, except one, who was an infant of thirteen when her mother died. Two of them, at least, lived within sight of the building in question at the time of the fire. So far as appears, therefore, there was no reason why a temporary administrator should not have been applied for and appointed. The contingency of death was foreseen and provided against by provisions in the policy which kept it alive notwithstanding that event: *Dolan v. Rodgers*, 149 N. Y. 489; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415. The legal representative was by the contract substituted as "the insured," upon whom rested the burden of performing those covenants which Mrs. Silvernail had entered into. The insurance company was under no obligation to procure the appointment of an administrator, temporary or permanent, even if it had been in a position to, because its promise to pay was dependent on prior action by the insured, but those entitled to the proceeds of the policy when paid were bound to do so, if they could by reasonable effort, so that the agreement could be performed on the part of "the insured."

If the executor could have acted by virtue of the power conferred <sup>462</sup> by the will, without probate or other action by the surrogate, his default is too apparent to require discussion.

Upon the assumption that the legal representatives of the insured, referred to in the policy, included the heirs at law, next of kin, legatees, or devisees, as the case may be, the situation of the plaintiff is not improved, because, according to that theory, there was no time when competent persons, sustaining one or more of those relations to the decedent, with full knowledge of all the facts, could not have given the preliminary notice and furnished the proofs of loss: *Wyman v. Wyman*, 26 N. Y. 253;

O'Brien v. Phoenix Ins. Co., 76 N. Y. 459; Greenwood v. Holbrook, 111 N. Y. 465. The delay in serving notices and in bringing the action was in no respect owing to the defendant, which, so far as appears, did nothing to mislead anyone, or to waive the defenses it now insists upon.

Some evidence was given tending to show that a son of the testatrix, about ten days after the fire, signed and swore to a statement of the loss and delivered it to an aunt, but he could not tell what she did with it. She died before the trial, and there was no satisfactory evidence to show that the statement sworn to by the son ever reached the defendant. One witness testified that he saw a lady, who, as he thought, was a "Silver-nail," deliver a paper to a man who claimed to be an adjuster and that they talked about the loss. The nature or contents of the paper was not shown, and it did not appear that the man was an adjuster for the defendant, except by the verification of the answer, which was not put in evidence. But, even assuming that there was evidence to sustain a finding that both the preliminary and final notice of loss were given to the defendant as required by the policy, the fact remains that this action was not begun until long after the time limited for that purpose had elapsed, and yet no lawful reason is given for not procuring temporary administration in time to have sued within the stipulated period.

Therefore, whether the policy means by legal representative the appointee of the surrogate, or some person directly <sup>463</sup> interested in the estate, or both, there was a failure to comply with its provisions, with no excuse for noncompliance. The "insured" was bound by contract to do certain acts, as conditions precedent to the right to recover, and was under a legal obligation, if there were obstacles in the way, of making a reasonable effort to remove them: Howland v. Edmonds, 24 N. Y. 307, 308; Porter v. Kingsbury, 71 N. Y. 588; Reining v. Buffalo, 102 N. Y. 308. If, after due diligence, they had proved insurmountable for a time, the delay would have been excusable, and performance at the earliest practicable moment thereafter would have been sufficient, but to excuse nonperformance it must appear that the act to be done could not, by any reasonable means, have been accomplished. Mere difficulty of performance is not enough: Wheeler v. Connecticut etc. Ins. Co., 82 N. Y. 543, 551; 37 Am. Rep. 594. In Sanford v. Sanford, 62 N. Y. 553, it appeared that the defendant's intestate was adjudged an idiot



in 1847, and that the committee then appointed died in 1854. The intestate died December 9, 1864, and during the ten years preceding his death he had boarded with the plaintiff and was clothed and cared for by her, and she paid his necessary funeral expenses, yet it was held that the statute of limitations applied to the whole claim accruing before the death of the intestate. Judge Allen said: "There was no legal impediment to an action against the intestate. Had there been a committee in office, the creditor could have petitioned the court either for a summary adjustment and payment of her claim, or for leave to sue. As there was no committee, although it seems the judgment of the court determining that the debtor was non compos mentis was in force, the plaintiff might have applied to the court for leave to sue, or, perhaps, have brought an action without such leave. One or the other of these courses was open to the plaintiff, and which would have been the proper practice it is not necessary to determine."

The failure to apply for a temporary administrator and to endeavor through him to give the notices required by the 404 policy and essential to perfect the cause of action, and then to have suit brought therefor within the period stipulated, was absolute and without excuse, and hence the plaintiff, upon the facts now presented, was not entitled to recover. The motion for a nonsuit, which raised generally or specifically all of the defenses discussed, should have been granted because it affirmatively appeared that the conditions of the policy had not been complied with by "the insured."

The judgment of the appellate division not only sustained the exceptions taken by the defendant upon the trial, but also dismissed the complaint on the merits. This it had no power to do. The Code of Civil Procedure provides two methods of review by the appellate division, before the entry of judgment, when the trial was before a jury. The first is authorized by section 1000 which permits the presiding judge, in his discretion, to order that the exceptions taken during the trial be heard in the first instance by the appellate division and that judgment be suspended in the mean time. In such a case, as the section further provides, "the exceptions must be heard upon a motion for a new trial, which must be decided by the appellate division." The decision should either grant or deny the motion. If the exceptions were well taken, the motion should be granted and the case sent back for a new trial. If the exceptions were

not well taken, the motion should be denied and judgment entered on the verdict, or the order of nonsuit as the case may be. *Huda v. American Glucose Co.*, 151 N. Y. 549. The only function of the appellate division is to grant or deny the motion and order judgment accordingly. It cannot go farther and dismiss the complaint on the merits, because the code does not authorize it. The verdict or order is the authority for the entry of a final judgment, and, if the exceptions are not sustained, the judgment must be in favor of the party for whom the verdict was rendered, while, if the exceptions are sustained, there can be no final judgment, but simply the award of a new trial.

The second method of reviewing before judgment is when a verdict is taken subject to the opinion of the court as authorized 465 by section 1185 of the code. In such a case, the motion is not for a new trial, but for judgment, and it may be made by either party before the appellate division under section 1234. The decision of a motion of that kind necessarily involves a direction for judgment.

As the case now before us arose under section 1000, the action of the learned appellate division in dismissing the complaint was inadvertent and without authority.

The judgment appealed from should, therefore, be so modified as to sustain the defendant's exceptions and order a new trial, and as so modified affirmed, with costs to abide event.

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**INSURANCE—CONSTRUCTION OF CONTRACT.**—Insurance policies must be liberally construed in favor of the assured so as not to defeat, without a plain necessity, his claim for indemnity, and where words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted: *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226; 59 Am. St. Rep. 411, and note; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544; 59 Am. St. Rep. 625, and note.

**CONTRACTS—WHAT EXCUSES PERFORMANCE.**—A thing improbable in a contract must be performed; a thing impossible may be excused: *Superintendent of Schools v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373. The performance of contracts rendered impossible by act of law is excused: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135.

**INSURANCE—PROOFS OF LOSS—WHEN MUST BE FURNISHED.**—A condition in a fire insurance policy that notice of loss must be given "forthwith" means that it must be given without unnecessary delay or with reasonable diligence under the circumstances of each particular case: *Central City Ins. Co. v. Oates*, 86 Ala. 588; 11 Am. St. Rep. 67, and note. A failure to render such notice until about two months after the loss occurred is not necessarily a failure to render it "forthwith," within the meaning of the policy. If the delay is accounted for by the ill-health of the assured, the confusion attending the fire, and other obstructions encountered by him: *Harneden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382; 54 Am. St. Rep. 467, and note.

**DARROW v. CALKINS.**

[154 NEW YORK, 503.]

**STATUTES OF LIMITATION—COTENANTS.**—Heirs of a partner who were infants at the time of his death, and who do not commence an action against the surviving partner for the partition of real property until thirty years after his death and more than fifteen years after the youngest of them became of age, are not barred by the statute of limitations from maintaining such action.

**JUDGMENT VOID BECAUSE PREMATURELY ENTERED.** Where the service of summons against infant defendants had not been completed when judgment against them was entered, it is void.

**PARTNERSHIP LANDS—THE AMERICAN RULE.**—In the absence of any agreement, express or implied, between partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves and also between the surviving partner and the real and personal representatives of the deceased partner, except that each share is impressed with a trust imposed by law in favor of the other partner, that so far as necessary, it shall be first applied to the adjustment of the partnership obligations and the payment of any balance found to be due from one partner to the other on the winding up of the partnership affairs. The working out of these rights does not require that the character of the property should be changed until an occasion arises for its conversion, and then only to the extent required.

**PARTNERSHIP LANDS, WHEN CONVERTED SO THAT THEY MUST BE DEEMED PERSONAL PROPERTY.**—If one partner conveys to another the interest of the former in partnership realty by a deed declaring that it is to be held as partnership property with the power to manage, and sell it and to pay from the proceeds to the grantor, his heirs, or assigns or legal representatives such portion as shall, at the closing of the partnership business, belong to such grantor, his heirs, assigns, executors, or other legal representatives, such conveyance operates as a conversion of such lands into personalty as between the grantee partner and the heirs or other legal representatives of the grantor.

**JUDGMENT AGAINST ADMINISTRATOR, WHEN BINDING UPON HEIRS.**—A judgment in a suit by an administrator of a deceased partner against a surviving partner fixing the amount due from the latter to the former upon a settlement of the partnership affairs is conclusive against the heirs of such deceased partner in any subsequent proceedings between them and the surviving partner or his successor in interest.

Suit by plaintiffs as children and heirs at law of Edwin J. Darrow to partition certain lands of which they claimed to be the owners of an undivided half, subject to the dower right of two of the defendants. The ancestor of the plaintiffs, Edwin J. Darrow, was in his lifetime a partner of Daniel O. Calkins of whom the defendants were the widow and three children. The property in controversy belonged to this partnership on the twenty-fifth day of September, 1891, at which time Darrow and his wife conveyed it to Daniel O. Calkins "to have and to hold, to control and manage, sell and convey the whole or any part of said premises as



part of the partnership property of the aforesaid Calkins and Darrow, and to pay over to said Darrow, his heirs, executors, assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to, or be due, or coming to, said Darrow, his heirs, executors, assigns, or other legal representatives." In October, 1867, a judgment was entered in a certain suit brought by Lucy P. Darrow against Daniel O. Calkins and others decreeing that the present plaintiffs had no interest in the lands now in controversy and that the interest of Edwin J. Darrow in such lands was personal estate belonging to the plaintiff as administratrix; that the assets of the copartnership were worth about twenty-eight thousand dollars of which the sum of fourteen thousand dollars was decreed to be paid to the plaintiff as administratrix upon which payment all the property and assets of the firm should belong to the partner, Daniel O. Calkins. This sum was afterward paid, and Calkins remained in possession of the real property until his death in July, 1867, after which the defendants became possessed thereof as his widow and heirs at law. The plaintiffs were infants at all times during the pendency of the action brought by the administrator of Darrow. They were served with summons on the twenty-second day of October, 1867. Two days later, on the petition of their mother, a guardian ad litem was appointed for them, who answered, submitting their rights and interests to the protection of the court. On October 31, 1867, the final judgment in that action was entered. In the present action, the defendants pleaded the statute of limitations.

Charles N. Morgan and Frederick B. Bailey, for the appellants.

Daniel Daly and William R. Syme, for the respondents.

**511** ANDREWS, C. J. We are relieved on this appeal from the inquiry which frequently arises between copartners and copartnership and individual creditors, whether real estate purchased and conveyed to the copartners during the existence of **512** the firm, by a conveyance which in form created a tenancy in common, is to be regarded as belonging to them collectively as partnership property, or as the individual property of each according to the interests disclosed on the face of the deed. The finding of the trial court, which is not assailed by any exception, is express, that the lands purchased by Daniel O. Calkins and Edwin J. Darrow were purchased by them as copartners out of the funds of the firm of Calkins and Darrow, and the deed

executed by Darrow to Calkins on the 25th of September, 1861, upon which both the plaintiffs and the defendants rely as determining the character of the ownership, expressly declares in the habendum that the lands were partnership property of Calkins and Darrow. We are to assume, therefore, that the lands were originally purchased out of partnership funds, with the intention on the part of each partner that they should be held as partnership property, subject to administration under the rules governing the rights and interests of copartners in lands purchased by them to be held as the property of the partnership. The partners, as between themselves, made the lands partnership property, and the rights of creditors of the firm or of the individual partners are not involved. The only question here is between the plaintiffs as heirs of Darrow and the children of Calkins, and it turns mainly on the question whether, upon the death of Darrow in 1864, an undivided half part of the lands to which he acquired the legal title by the deeds running jointly to himself and Calkins, executed between 1850 and 1854, descended to and vested in the plaintiffs as his heirs at law. The plaintiffs, at the death of Darrow, were infants, and although this action was not commenced until thirty years after his death, nor until fifteen years after the younger of the plaintiffs became of age, it seems, under the case of *Howell v. Leavitt*, 95 N. Y. 617, the plaintiffs, although they have slumbered upon their rights during an adverse possession of twenty-seven years, were not barred by the statute of limitations. So, also, we think it must be held that they were not barred by the adjudication in the decree of October 31, 1867, 513 in the action brought by the administratrix of Darrow against Calkins for the settlement of the partnership affairs, which declared that "they had no title or interest in the said lands and real estate as heirs of the said Edwin J. Darrow, deceased, or otherwise." The service of the summons on the infants by publication was not completed when the judgment was entered, and until the period of publication had expired the court could acquire no jurisdiction to appoint a guardian ad litem or to render a judgment binding upon them as parties to the action: *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84; *Crouter v. Crouter*, 133 N. Y. 55.

The legal nature and incidents of land purchased by a co-partnership with copartnership funds is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the

cases, come to be that lands so purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become ipso facto, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners inter se, as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law: *Darby v. Darby*, 3 Drew. 495; *Essex v. Essex*, 20 Beav. 442; *Lindley on Partnership*, 3d ed., 681 et seq. This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor: *Fairchild v. Fairchild*, 64 N. Y. 471; *Shearer v. Shearer*, 98 Mass. 114. *Lindley*, in his work on *Partnership*, bases the rule on the nature of the interest of each partner in the partnership property. He says (*Lindley on Partnership*, 687): "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have <sup>514</sup> been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." The concluding words of the paragraph quoted concede that the intention of the parties will prevent a conversion where that intention is manifested. The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality when it is admitted on all hands



that partnership real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

The clear current of the American decisions supports the rule that, in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary <sup>515</sup> for these purposes the character of the property is in equity deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the American rule. We refer to a very few of them: *Buchan v. Sumner*, 2 Barb. Ch. 167; 47 Am. Dec. 305; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 N. Y. 471; *Shearer v. Shearer*, 98 Mass. 114; *Shanks v. Klein*, 104 U. S. 18.

If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner, his equitable title descends to his heirs or goes to his devisees, but subject to the primary claims growing out of

the partnership relation: *Fairchild v. Fairchild*, 64 N. Y. 471; *Parsons on Partnership*, sec. 272. But the general principles to which we have adverted are those applied by courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject. It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted pro tanto for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where by such <sup>516</sup> agreement it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are, in most cases of this kind, so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands, as well as the chattels were intended by the partners to constitute a part of the partnership stock, and that both together should take the character of personalty for all purposes, and Judge Denio in *Collumb v. Read*, 24 N. Y. 505, expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained is conceded by most of the cases: See *Hoxie v. Carr*, 1 Sum. 183; *Fall River Whaling Co. v. Borden*, 10 Cush. 462; *Collumb v. Read*, 24 N. Y. 505; *Parsons on Partnership*, sec. 267.

The legal title to the real estate which the heirs of Edwin J. Darrow asked to have partitioned in this action was vested in Daniel O. Calkins at the time of the death of Darrow in November, 1864. The plaintiffs, on the death of their father, took no legal estate in the lands. The legal estate which prior to the twenty-fifth day of September, 1861, Darrow held in the un-

divided one-half of the premises was by the deed executed by him on that day conveyed to Calkins. That this was the effect of the deed we have no doubt. The deed is in terms full and ample to convey in fee the interest of Darrow to his grantee. It was coupled, however, with the declaration on <sup>517</sup> the face of the deed that it was to be held by Calkins as partnership property, and the deed contained a power of management and sale, and this was followed by the significant clause, "and to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to said Darrow, his heirs, executors, assigns, or other legal representatives." The suggestion that the deed attempted to create an express trust in lands, not within the enumerated trusts permitted by section 55 of our statute of "uses and trusts" (1 Rev. Stats. 728), and, was, therefore void as a conveyance, is not well founded. It recognized a pre-existing trust imposed upon the lands, implied by law and arising out of the partnership relation, and that the trust was to continue notwithstanding the conveyance of the legal title. This was not, we think, in contravention of the statute, which contemplated the creation of original trusts, and not the abrogation of existing trusts resulting from or implied by operation of law; nor did it render inoperative the subsequent recognition of such an existing trust in connection with a conveyance of the legal title. We think the legal title to the one-half part of the land passed by Darrow's deed, subject to the performance by Calkins of the trust therein declared. The important question is, whether it operated to convert the partnership lands into personalty, and to change the interest of Darrow, or his representatives, from an interest in the land as realty into an interest in the proceeds of the lands, after a sale thereof by Calkins under the power contained in the deed.

We are of opinion that it was the intention of the partners, disclosed on the face of the deed and by the surrounding circumstances, to substitute in place of Darrow's prior interest in the lands, as such, an interest in him and his representatives in any surplus which should remain after a sale by Calkins and the adjustment of the partnership affairs. It is not necessary to decide whether the surplus, when ascertained, would go to the real or personal representatives of Darrow. As between <sup>518</sup> Darrow and his representatives, and Calkins and



his representatives, the deed operated as a conversion of the lands into personalty. The personal representatives of Darrow were entitled to enforce, in an action for an accounting and an adjustment of the partnership affairs, the claims of Darrow's estate. This was the purpose of the action which resulted in the decree of October 31, 1867, and we think that decree was binding upon the plaintiffs, not on the ground that they were parties, but for the reason that no controversy existing as to the original character of the property as partnership, property, or as to the subsequent dealing between the partners in respect to it, the heirs of Darrow were not necessary parties to a final adjustment of the partnership affairs, including the interest of the Darrow estate growing out of his relation to the lands under the deed of September 25, 1861. It was open to the plaintiffs on an accounting by the administratrix of the Darrow estate to claim that the fourteen thousand dollars, received by her under the decree in the action for an accounting, should be regarded as real and not personal assets, and that they were entitled to it in their character as heirs, and not as distributees.

We think the order of the court below reversing the judgment at special term was correct, and it should, therefore, be affirmed and judgment absolute entered for the defendants on the stipulation, with costs.

All concur.

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**LIMITATIONS OF ACTIONS BETWEEN COTENANTS—INFANCY.**—The statute of limitations does not run in favor of a tenant in common receiving an undue share of profits of the common property until he begins to hold adversely to the knowledge of his cotenant: *Huff v. McDonald*, 22 Ga. 131; 68 Am. Dec. 487, and note. It does not run during the infancy of any cotenant of realty against the other cotenants in South Carolina, whether they sue jointly or severally and this rule applies in case of successive minorities: *Hill v. Wilson*, 4 Rich. 521; 55 Am. Dec. 696, and note. See monographic note to *Moore v. Armstrong*, 36 Am. Dec. 68, 69, as to the effect of infancy upon the running of the statute of limitations.

**JUDGMENT—VOID FOR LACK OF SERVICE OF PROCESS.**—Absence of legal service or authorized appearance is jurisdictional, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired: *Great West Min. Co. v. Woodmas* etc. Min. Co., 12 Colo. 46; 13 Am. St. Rep. 204, and note; *Reinart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52. See *Coffin v. Bell*, 22 Nev. 169; 58 Am. St. Rep. 738, and note.

**PARTNERSHIP—REALTY OF, TREATED AS PERSONALTY.**—The real estate of a partnership is subject to the same rules as its personal property: *Brady v. Kreuger*, 8 S. Dak. 464; 59 Am. St. Rep. 771, and note. In equity, and for partnership purposes it is to be treated as personalty: *Rovelsky v. Brown*, 92 Ala. 522; 25 Am. St.

Rep. 83, and note. It is immaterial in whom the legal title is vested: *Galbraith v. Tracy*, 153 Ill. 54; 46 Am. St. Rep. 867, and note. See *Bates v. Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133, and note; monographic note to *Smith v. Smith*, 43 Am. St. Rep. 378.

EXECUTORS AND ADMINISTRATORS — JUDGMENTS AGAINST — CONCLUSIVENESS UPON HEIRS. — Judgments against administrators establishing debts against their estates are, in the absence of fraud, equally conclusive upon the administrators and the heirs, both as to the personalty and realty belonging to their estates: *Moody v. Peyton*, 135 Mo. 482; 58 Am. St. Rep. 604, and note. See note to *Moore v. Hillebrant*, 65 Am. Dec. 124, 125.

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## BAILY v. HORNTAL.

[154 NEW YORK, 648.]

PRACTICE—EVIDENCE RECEIVED WITHOUT OBJECTION.—It is the duty of the trial court, in the absence of objections to the evidence or to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of action established by such evidence.

PARTNERSHIP—FRAUD UPON CREDITORS BY ALLOWING PARTNER OF INSOLVENT FIRM TO WITHDRAW CAPITAL ON RETIRING.—The present share of a partner in an insolvent firm is less than nothing, whatever may be the amount of capital brought in by him; and to permit him to withdraw from the firm any sum of money is to defraud its creditors, whether he be a special or a general partner. Hence its creditors may maintain an action to reach any moneys or property withdrawn or paid over to such retiring partner.

INSOLVENCY, EVIDENCE OF, WHEN SUFFICIENT.—If, within six months after the dissolution of a partnership and the retiring of a member therefrom, it appears that those remaining in the business failed owing seven hundred thousand dollars, of which nearly one-half was unsecured, that the assets were not sufficient to meet more than one-half of the unsecured obligations, and that there had not been any considerable shrinkage in values, or other losses, during this time, a court or jury is justified in finding that the partnership was insolvent at the time of such dissolution.

INSOLVENCY—GOOD CREDIT NOT INCONSISTENT WITH.—The ability to run in debt is not the same as the ability to pay up, and will not relieve a partnership from the imputation of insolvency. A concern is not solvent unless it has property enough to pay debts.

APPELLATE PRACTICE.—A GENERAL EXCEPTION TO A FINDING MADE AFTER THE CLOSE OF THE TRIAL, when there was no opportunity to meet the point by amendment or otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have been successfully met and answered.

JUDGMENT, PERSONAL, IN SUIT IN EQUITY.—A court of equity may adapt itself to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff or give him a personal judgment therefor, to be enforceable by execution. In a suit against members of a partnership and a retiring member thereof to subject to execution property fraudulently withdrawn by the latter, the court may enter personal judgment against him.

George Hoadly and F. P. Delafield, for the appellant.

Charles E. Hughes and Arthur C. Rounds, for the respondents.

653 VANN, J. This is a creditors' action wherein the plaintiffs, as judgment creditors of Albert and Robert Weis, with executions returned unsatisfied, seek to reach a specific fund in the hands of the defendant Hornthal upon the theory that he has no right to the same, as against the creditors of said judgment debtors, because he received it from them virtually as a gift when they were insolvent.

654 While some of the allegations of the complaint are adapted to an action at law to charge Mr. Hornthal as a general partner, the action was tried and decided as an action in equity, in the nature of an ordinary creditor's bill, to reach assets of Albert and Robert Weis, transferred to said Hornthal in fraud of their creditors. The relief demanded, the evidence admitted without objection, the statements made by both court and counsel during the trial, as well as the decision and judgment, all show that this was the theory of the action as accepted by all who took part in the trial. Thus, after various judgment-rolls and executions had been read in evidence, but before any oral evidence was received, and as the plaintiff was about to read a deposition taken by stipulation, the defendants' counsel remarked that, "so far as there is an attempt by this testimony to establish that class of irregularities, which, according to the statutes of Texas, would make Mr. Hornthal a general partner, there can be no recovery under this complaint; but if the gentleman confines his case to his statement made in opening, that he simply claims that Mr. Hornthal received \$50,000 which he ought not to have received, then there is no well-founded objection to this testimony, or any part of it." Immediately after this statement the trial judge said: "This is a creditor's action to reach a specific fund," and both parties apparently acquiesced in this declaration by the court as to the theory of the action. At no time during the trial was the position thus taken changed by the counsel for either party, and the opinions, both of the special and general term, show that this was the view that they took of the nature of the action. We shall confine our review to the theory, adopted by the parties and the courts below, that the action was in equity to reach assets fraudulently transferred by insolvent debtors, because, as we have frequently held, it is the duty of



the trial court, in the absence of objections to evidence or to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of action established by the evidence: *Knapp v. Simon*, 96 N. Y. 284, 292; *Frear v. Sweet*, 118 N. Y. 454, 458; *Sterrett v. Third Nat. Bank*, <sup>655</sup> 122 N. Y. 659, 662. The record before us shows no exception taken by the defendant to any ruling of the trial judge relating to the admission or exclusion of evidence. There was no motion for a nonsuit or to dismiss the complaint, and no question was raised by answer, demurrer, or otherwise as to a defect of parties, plaintiff or defendant. The only exceptions that we find in the record are those taken to the written decision of the trial judge upon which the judgment in question was entered. It is unnecessary, therefore, for us to decide whether a contract, made by one of the general partners, in the name of a limited partnership, without the knowledge or authority of the special partner, for goods to be delivered to such partnership after the date fixed by the articles for its expiration, is binding upon the special partner. The question that now confronts us is, whether the limited partnership was insolvent when it expired, and, if so, whether the special partner, in the absence of any agreement upon the subject, can retain the capital that he had contributed to the firm, when paid to him by the general partners after they had become insolvent, as against creditors whose claims were in existence when the payment was made. Whether the debts upon which the plaintiffs recovered judgment were contracted in April, 1891, when the goods, with an unimportant exception, were actually ordered, but under such circumstances as are claimed not to bind the special partner, or in the summer following, when the goods were actually received by the general partners, under such circumstances as to raise an implied promise on their part to pay for them, is not important on this appeal, for, even upon the latter basis, both debts were in existence when the trust deed was given, which resulted in the payment to the appellant of \$27,343.95 in behalf of the judgment debtors before this action was commenced.

The trial court found that the limited partnership was insolvent when it terminated on the 30th of April, 1891, and that since that date the succeeding general partnership, as well as the general partners, have continuously been <sup>656</sup> insolvent. If this is true, the capital of the special partner was exhausted, and the general partners had no right to pay him, and he had no

right to receive from them anything on account thereof, at least in the absence of an agreement made in good faith, in ignorance of the fact of insolvency and without knowledge of such facts as would put a prudent man upon inquiry.

As is well said by Mr. Lindley in his work on Partnership: "The present share of a partner in an insolvent firm is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently, a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share, is defrauding the creditors of the firm": Lindley on Partnership, \*573. This applies with the same force to a limited as to a general partnership, for necessarily, the capital of either kind of association is consumed when the assets are less than the liabilities. The contribution of the special partner is at the risk of the business the same as that of the general partners, and when both are lost by insolvency there is no foundation for a claim of restoration by either. There is no evidence of any express agreement as to the disposition of assets after the dissolution, and the good faith of any implied agreement is negatived by the finding of the trial judge to the effect that the payments made by the general partners to the special partner "were not for value or in satisfaction of any valid claim, but were entirely voluntary"; that they were made "with intent to hinder, delay, and defraud creditors," and that they were fraudulent as against the creditors of the general partners. As the facts found by the trial court have been confirmed by the general term, although apparently after some hesitation, we can only look into the evidence to see whether there was any to support the conclusion of the courts below: *White v. Benjamin*, 150 N. Y. 258.

As bearing on the question of insolvency, which is of controlling importance, we have the fact that six months after the dissolution of the special partnership, the general partners, 657 who continued the same business with the same assets, failed, owing over \$700,000, of which more than \$314,000 was unsecured, and, as stated by Mr. Hornthal in his evidence, "the amount which could be depended on to settle with the creditors who were not secured by the trust deed was \$166,000, and the amount that that \$166,000 had to meet was \$314,000 and more." Thus an admitted deficiency of about \$150,000 arose within a comparatively short time after the dissolution, and yet no very heavy losses were sustained in the mean time.

The volume of the yearly business did not exceed \$800,000, which would make \$400,000 for the six months in question, so that the deficiency, as conceded, amounted to thirty-seven per cent of the gross amount of business done. To this admitted deficiency the inference was permissible that certain additions should be made, because the accounts classified as good, in reaching the deficiency of \$150,000, proved uncollectible to the extent of nearly \$60,000, and there was \$30,000 left unpaid upon the claims secured by the trust deed when the trust was closed. While there is no presumption that the firm was insolvent in April because its successor failed in November, the difference between the assets and liabilities at the latter date was so overwhelmingly large as to require explanation, but no satisfactory explanation was given. Evidence was furnished tending to show a net loss of \$32,000 during the intervening period, and the drawings of the copartners for the year were between \$20,000 and \$30,000, of which not more than one-half can fairly be assigned to the last six months. No sudden or unusual depreciation in the value of merchandise was shown. The stock on hand brought seventy cents on the dollar when sold by the trustee, but there was more sacrifice in disposing of some of the other assets. Doubtless, there was an accumulation of old and unsalable stock, the same as there had been an accumulation of stale and uncollectible accounts, but this was the result of the business of years, not of the last six months. One of the general partners testified that "the only cause for the failure, the substantial cause I would give, would be losses of bad accounts running a number of years <sup>658</sup> back." Mr. Hornthal, when shown a letter written by him on the 2d of December, 1891, to certain creditors for the purpose of obtaining a settlement for the Weis Brothers, in which he included, among other assets, some bills receivable amounting to \$387,386.84, testified that "a very small amount, probably not over \$1,000 or \$2,000," was collected out of this large sum. Albert Weis stated the cause of the failure to be "heavy losses in business which were sustained. Bills of goods were sold we did not get any money for. We did an extensive credit business and did not collect. Those losses were two or three years before our failure." He thought "perhaps about one-third" of the bad debts accrued during the last year, but stated that some of the accounts began a good many years ago and were in judgment. On cross-examination, he said that "there was no consid-



erable shrinkage in the value of our outstanding notes and accounts from the 30th of April, 1891, to the date of our failure," and, on the redirect, that he was "almost certain that our indebtedness was larger in 1890 than it was in 1891." Both the limited partnership and the general partnership that succeeded it had large accommodations from the banks. Old notes were taken up by new discounts, and there was a shifting of creditors through the purchase of new goods, and the use of the proceeds to pay old debts. Thus, one of the general partners testified: "We did not pay up one set of spring purchases before the fall purchases began to come in. They always lap. We never get out of debt. Our accommodations at the bank ran right along the same way, lapped over all the time. We discount and rediscount as we need the money right along." Their credit was good all the time, but credit, which enables one to contract debts, should not be confounded with solvency, which enables one to pay debts. The ability to run in debt is not the same as the ability to pay up, nor will it relieve either firm from the imputation of insolvency to say that, as soon as the failure took place, it was followed by the failure of some of their debtors, and the refusal to pay by others, who had kept on paying as long as they could obtain more goods on credit. Nothing appears in <sup>659</sup> the evidence to show that this would not have happened if the affairs of the limited partnership had been closed in the usual way at the date of dissolution. The fact that the practical value of assets may depend, to some extent, upon the continuance in business by the owner, has no application to this case, for the limited partnership did not continue in business, but ceased to exist on the last day of April, 1891. A concern is not solvent unless it has property enough to pay its debts. An account that depends for collection upon the volition of the debtor, and his hope of further advantage, cannot be counted as an available asset, for, when liquidation comes, those accounts prove uncollectible. The nominal value of unsalable goods and uncollectible accounts has little to do with actual solvency, which depends upon the amount that can be realized from the assets, when converted into money without unreasonable haste or sacrifice, as compared with the amount of liabilities. While the evidence did not compel, it permitted, the conclusion that if the affairs of the limited partnership had been wound up at the date of dissolution by any reasonable process of liquidation, there would not have been

assets sufficient to meet the liabilities. One of the general partners had no private property, and the other had no more than enough to pay his personal debts. The controlling fact of insolvency, as applied to the old firm and the new, as well as to the general partners, for the insolvency of the firm involved them personally, having been found by the courts below upon sufficient evidence, must be accepted by us as final for the purpose of this review. The payments to Mr. Hornthal, therefore, were not in satisfaction of a valid claim, but were in the nature of a gift, although nominally a restoration of capital. He was not entitled to the return of his contribution to the capital in any event, for the articles are silent upon the subject, but only in case the firm was solvent and there was a surplus after the payment of debts. After the dissolution there was no accounting and no balance struck, but matters were left in the same unsettled condition as before, so that he had no enforceable claim for the return of <sup>660</sup> his special capital either against the new firm or the general partners. Passing by the first payment to him of \$25,000, made in May, 1891, owing to the question whether the claims of the plaintiffs were then in existence, we think they were entitled to reach the payment made under the trust deed, which was more than enough to satisfy their judgments. There can be no doubt that the indebtedness to the plaintiffs had then arisen and the judgment debtors owed Hornthal nothing when they gave him security for \$26,433.34, all of which, with interest, was subsequently paid to him. He had no right to receive it and took no title thereto as against creditors in the situation of the plaintiffs, who are armed with judgments recovered and executions returned unsatisfied: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436.

The point now made, that the unpaid creditors under the trust deed, which was not a general assignment or for the benefit of creditors generally, are entitled to the fund in preference to judgment creditors, was not raised either by the pleadings or by an exception to any ruling made during the trial. Non constat, if it had been thus raised, it would either have been answered by proper evidence, or the complaint would have been amended and other parties brought in if necessary. The plaintiffs were entitled to such a judgment as the pleadings and the evidence warranted, without regard to the possible rights of third parties, that were not brought to the attention of the trial court and are the subject of no exception taken while the trial

was in progress. Upon an appeal from a judgment in a civil action, the court of appeals can decide no question, except one not now important, unless it is raised by demurrer, or is founded on an exception taken in due time. A general exception to the findings, taken after the close of the trial, where there was no opportunity to meet the point by amendment or otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have then been successfully met and answered.

A personal judgment against Mr. Hornthal was proper, for a court of equity may adapt its relief to the exigencies of the <sup>601</sup> case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution: *Murtha v. Curley*, 90 N. Y. 372. The form of judgment does not determine the nature of the action. In this case, the judgment is in the form of one rendered in an action at law, yet the plaintiffs could not have prevailed without first showing that they had exhausted all their remedies at law. Having a judgment against the Messrs. Weis only, they could not issue an execution against Mr. Hornthal without first obtaining a decree of a court of equity that the latter had money in his hands which equitably belonged to the creditors of the former. As no property was to be sold, no receiver was needed, and, under the circumstances, a money judgment was precisely the relief that a court of equity should have rendered.

The judgment should be affirmed, with costs.

All concur, except O'Brien and Haight, JJ., who dissent.

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**INSOLVENCY—WHAT IS—HOW PROVED.**—"Insolvency," in his general and popular meaning, denotes the insufficiency of the entire property of a corporation or individual to pay its or his debts, but, under bankruptcy and insolvency proceedings, it denotes inability to pay debts as they become due in the ordinary course of business: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756. Solvency cannot be shown by proving character for honesty, and by showing that the party always paid his debts. There must be evidence of property. The term "solvency" means ability to pay, not a mere disposition to do so: *Janes v. Scott*, 59 Pa. St. 178; 98 Am. Dec. 328.

**EQUITY—JURISDICTION TO ENTER PERSONAL JUDGMENT.** The fact that the final relief granted may be, or is, a personal judgment is not conclusive against the jurisdiction in equity, because, when jurisdiction is once acquired, it will be retained to the end, though relief is reached by a mere personal judgment: *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274; 26 Am. St. Rep. 523, and note. See *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.



**APPEAL—OBJECTIONS NOT MADE AT TRIAL.**—Admission of evidence alleged as error cannot be considered on appeal, if no ground of objection is stated at the trial: *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240, and note. See *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH CAROLINA.**

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**ELIZABETH CITY COTTON MILLS v. DUNSTAN.**

[121 NORTH CAROLINA, 12.]

**"BY"—MEANING OF.**—When used to designate a terminal point of time, the word "by" means "not later than," and includes the night of a day "by" which a transaction must be completed to be binding.

**CORPORATIONS—AGREEMENT FOR STOCK SUBSCRIPTION—MEANING OF WORD "BY."**—An agreement that a subscription to the capital stock of a corporation is not to become binding unless a certain amount is subscribed "by" a certain day, becomes binding if such amount is subscribed on the night of the day named.

**CORPORATION—FORFEITURE OF STOCK FOR UNPAID SUBSCRIPTIONS—BY-LAWS.**—A corporation may be empowered to provide by its by-laws for the sale of the stock of a subscriber who makes default in the payment of assessments, and such by-laws, if reasonable, may be enforced by the courts.

Action to recover the difference in amount between defendant's subscription to the stock of the plaintiff corporation and the amount for which the stock sold after having been declared forfeited according to the by-laws of such corporation. The defendant agreed to take five shares of stock in the plaintiff corporation, and signed a subscription agreement as follows: "We, the undersigned, mutually agree with each other that we will take and pay for the number of shares opposite our names hereby subscribed as stock in a cotton factory to be erected in or near Elizabeth City, N. C., and to pay for each share of stock the sum of one hundred dollars as follows: five per cent when temporary organization is made, five per cent in thirty days thereafter, and balance in monthly installments of not more than ten per cent, provided this shall not be binding unless eighty thousand dollars

is subscribed by July 1, 1895." Section 25 of the by-laws of the company was as follows: "If any stockholder shall fail to pay his installment when called by the board of directors for two months, the stock of such delinquent may be declared forfeited by the board of directors and sold for account of such delinquent, publicly, after thirty days' notice, and the net proceeds of such sale be applied first to the payment of all amounts due upon such stock and the balance, if any, paid to delinquent; provided, however, that the forfeiture and sale of the stock of any delinquent shall not release him from his original subscription; and such delinquent shall forfeit his right to vote at all meetings of stockholders. And no subscriber shall be entitled to vote at any meeting of the stockholders until he shall pay at least one assessment." Defendant never paid his subscription nor any of the assessments levied thereon. Judgment for plaintiff, and defendant appealed.

G. W. Ward, for the appellee.

<sup>16</sup> CLARK, J. The agreement was that the subscription was not to be binding unless the sum of eighty thousand dollars was subscribed "by July 1st." The full amount named was subscribed at the meeting held on the night of July 1st. This was a performance of the condition. "By" has many significations, but when used to designate a terminal point of time it is defined by the Century Dictionary to mean "not later than," "as early as." The Standard defines it "not later than," and Webster "not later than," "as soon as." The condition, therefore, "by July 1st" meant that the whole amount should be subscribed "not later than" July 1st. It has been held that a bill or note for the payment of money "by November 1st" is due on that day: *Preston v. Dunham*, 52 Ala. 217; *Randolph on Commercial Paper*, sec. 110. A note payable "by 20th of May" is due on that day: *Stevens v. Blunt*, 7 Mass. 240; 1 *Daniel on Negotiable Instruments*, sec. 43. In like manner a promise to pay "against 25th of December" is due on that day: *Goodloe v. Taylor*, 10 N. C. 458. A note payable "on or by" a certain day is payable on that day: *Massie v. Belford*, 68 Ill. 290. A contract to deliver "nine hundred bushels of barley by November 1st," is performed by its delivery on or before that day: *Coonley v. Anderson*, 1 Hill, 519.

The evidence is uncontradicted that the stock was duly advertised and sold in accordance with the terms of the company's by-laws, notice first having been sent the defendant by mail, who



admits receipt. His denial of having seen the advertisement has no bearing. It is true that, in the absence of statutory authority, the power to declare stock forfeited for nonpayment of assessments is not inherent in a corporation (23 Am. & Eng. Ency. of Law, 818), but the code, section 664, empowers corporations to provide by their by-laws, *inter alia*, "the mode of selling shares for nonpayment of assessments." The by-law in this case is a reasonable one. The defendant has been unfortunate but he has <sup>17</sup> no valid ground of objection to the proceeding by which he has both lost his stock and been adjudged to pay the difference between his subscription and the price for which the stock was sold. He would have avoided all loss if he had paid for his stock according to the terms of his subscription. The other stockholders had a right to hold him to his contract. If this were not so, all corporate enterprises would fail in the beginning.

No error.

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**CORPORATIONS—FORFEITURE OF STOCK—BY-LAWS.**—The authority to forfeit shares for nonpayment of the subscription cannot be created by a by-law. The question whether a corporation, by a by-law, may create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation is not settled: *Monographic note to People's etc. Bank v. Superior Court*, 43 Am. St. Rep. 156. Such a lien did not exist at the common law, and, unless created by statute or otherwise, has no existence: *Gemmel v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412, and note. Where a power is given to forfeit the stock of stockholders for unpaid assessments, it must be strictly pursued: *Morris v. Metalline Land Co.*, 164 Pa. St. 326; 44 Am. St. Rep. 614, and note. See *Budd v. Multnomah Street Ry. Co.*, 15 Or. 413; 3 Am. St. Rep. 169, and note; *German-town etc. R. R. Co. v. Fitler*, 60 Pa. St. 124; 100 Am. Dec. 546. A sale of stock for an illegal, or partially illegal assessment is invalid: *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236, and note.

**TIME WITHIN WHICH AN ACT IS TO BE DONE—HOW COMPUTED.**—For a discussion of the manner of computing the time within which an act must be done, see extended notes to *Avery v. Stewart*, 7 Am. Dec. 250, 251; *Cressey v. Parks*, 46 Am. Rep. 410-416; *Murfree v. Carmack*, 26 Am. Dec. 234-236.

## SINGER MANUFACTURING CO. v. DRAUGHAN.

[121 NORTH CAROLINA, 88.]

**GUARANTY—WITHDRAWAL FROM.**—One who signs a "continuing guaranty" for the faithful performance of duty by an agent may withdraw therefrom at any time by giving notice to the principal, and is not liable for any default on the part of such agent in matters intrusted to him after such notice has been given and received.

T. H. Busbee, for J. J. Wade, appellant.

<sup>88</sup> **FURCHES, J.** The defendant Draughan was the agent of the plaintiff for selling its machines, and as such agent he <sup>89</sup> entered into a written undertaking for the faithful performance of his contract, in accounting for and paying over to the plaintiff all moneys collected by him under said agency, with the defendant Wade as his surety.

This undertaking is called a continuing guaranty in which the following language is used: "The condition of the above obligation, which is expressly intended as a continuing guaranty," and bears date the third day of July, 1890. On March 4, 1893, the defendant Wade notified the plaintiff by letter that he would not be responsible as surety of defendant Draughan after the receipt of this letter by the plaintiff. It was admitted by the plaintiff that it received this letter, to which it made no reply.

The plaintiff complained for a breach of this undertaking, and the defendant Wade answered admitting that he signed the contract sued on and that he was liable for such breaches as had occurred before the receipt of his letter of the 4th of March, 1893, but denied that he was liable for any breach committed by the agent Draughan since that time.

The matter was referred to Alexander Stronach to take and state an account of this agency. Stronach took the account, and reported that Draughan was indebted to the plaintiff on account of said agency "in the sum of four hundred and forty-four dollars and sixty-two cents with interest on the same at the rate of six per cent from the tenth day of October, 1893, to wit, eighty-six dollars and sixty-eight cents, and the costs of this action to be taxed by the clerk," and the referee was allowed twenty-five dollars, to be taxed as costs. The referee does not find what part of this sum of four hundred and forty-four dollars and sixty-two cents arose from breach before the receipt of the letter of the 4th of March, 1893, nor does he find when said letter was received by the plaintiff, but it was admitted on the trial that a large part of

the sum found due the plaintiff arose from transactions after the receipt of that letter. The defendant Wade excepted to the report of <sup>90</sup> the referee, and alleged that he was only liable for that part which accrued before the plaintiff received his letter of the 4th of March, 1893. But the court was of a different opinion and gave judgment against the defendant Wade for the whole amount. In this there is error.

This undertaking was a "continuing guaranty" for the faithful discharge of duty, by the plaintiff's agent Draughan. The plaintiff could have discharged Draughan at any time, or could have refused to furnish him any more machines. And if plaintiff continued him in its employment and furnished him with other machines after it received the defendant Wade's letter, saying that he would not be longer liable for Draughan's agency, it did so at its own risk: 1 Parson on Contracts, 3d ed., 517, tit. "Revocation of Guaranty"; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *La Rose v. Logansport Bank*, 102 Ind. 332. These cases cited from New York and Indiana sustain the principle enunciated in 1 Parsons on Contracts, though, as they relate to bank cashiers, it was held that the notice of the withdrawal of the surety could not be allowed to take effect until the cashier had a reasonable time to get other sureties. This distinction was put on the ground of public policy, as the bank was a public institution. But no such reason applies in this case.

This case falls under that of the *Howe Machine Co. v. Farington*, 82 N. Y. 121, which is very much like this. The defendant Wade must be held liable to the plaintiff for all machines or moneys arising from the sale of machines that went into the hands of the agent Draughan before the plaintiff received the defendant Wade's letter of the 4th of March, 1893, but not for those furnished him after that date. There is a distinction between future liabilities and a suretyship for a debt where the consideration has passed. But this distinction we do not discuss in this opinion.

For the error pointed out, the case should be recommitted <sup>91</sup> to the referee with instructions to ascertain the date of the receipt of the letter of defendant Wade of the 4th of March, 1893, revoking his suretyship for the agent Draughan, and the amount for which Draughan is liable to the plaintiff upon machines furnished him before the receipt of the said letter.

Error.



**GUARANTY—CONTINUING—WHAT IS—HOW TERMINATED.**  
A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty in the case of the failure of another person who is in the first instance liable: *Mathews v. Chrisman*, 12 *Smedes & M.* 595; 51 *Am. Dec.* 124. For instances of contracts held to be continuing guaranties, see *Gard v. Stevens*, 12 *Mich.* 292; 86 *Am. Dec.* 52, and note; *Fellows v. Prentiss*, 5 *Denio*, 512; 45 *Am. Dec.* 484, and note; note to *Menard v. Scudder*, 56 *Am. Dec.* 619. A collateral continuing guaranty is to be construed as favorably in favor of the creditor, and as strongly against the guarantor, as the sense of the words of the contract will permit: *Taussig v. Reid*, 145 *Ill.* 488; 36 *Am. St. Rep.* 504, and note. See *First Commercial Bank v. Talbert*, 103 *Mich.* 625; 50 *Am. St. Rep.* 385, and note.

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## • McCASKILL v. McKINNON.

[121 NORTH CAROLINA, 192.]

**JUDGMENTS—FINALITY—STATUTE OF LIMITATIONS.—**  
A judgment for a debt, including a decree for the foreclosure of the mortgage securing such debt, is final as to the debt at the time when rendered and not at the time when the sale of foreclosure is confirmed and the deficiency ascertained. The statute of limitations begins to run against the judgment plaintiff, in such case, from the time of the money judgment.

**JUDGMENTS—PAYMENT ON—STATUTE OF LIMITATIONS.—**  
A payment on a judgment does not arrest the running of the statute of limitations.

Motion for leave to issue execution. Judgment denying such motion, and plaintiff appealed.

J. F. Payne, for the appellant.

W. H. Neal, for the appellee.

194 CLARK, J. Judgment was rendered at September term, 1886, in favor of the plaintiff against the defendant to recover the sum of three thousand dollars and interest and decreeing the foreclosure of the mortgage which had been executed to secure the debt. At June term, 1887, the commissioner appointed under the decree of foreclosure made his report, which was confirmed, and he was directed to credit the aforesaid judgment with the sum of fifteen hundred dollars realized at the foreclosure sale and to make title to the purchaser.

This was a motion under section 440 of the code for leave to issue execution, made before the clerk of Richmond county on the 15th of February, 1897, and heard on appeal by the judge at chambers in Carthage, Moore county.

The plaintiff contends that the judgment at September 195 term, 1886, was interlocutory only, and that there was no final

judgment till June term, 1897, and hence that he is not barred by the statute of limitations: Code, sec. 152, subd. 1. But the judgment at the fall term, 1886, was final as to adjudging the recovery of money, and it is only for the recovery of the unpaid part of the sum therein adjudged that execution is moved for. The judgment of September, 1886, was "retained for further directions" and interlocutory only as to the foreclosure; and upon the final judgment rendered as to that at June term, 1897, no execution is now asked, or indeed could be asked. It was the conclusion of that matter and left nothing which could be done by an execution, if issued now. An action on the judgment would be barred (*McDonald v. Dickson*, 85 N. C. 248), but notwithstanding the lien of the judgment has ceased, a motion to issue execution thereon would not be barred if execution had been regularly issued once in every period of three years: *Williams v. Mullis*, 87 N. C. 159. But here the record shows that no execution had issued since July, 1887: *Lytle v. Lytle*, 94 N. C. 683.

The payment entered upon the judgment at June term, 1887, did not arrest the running of the statute: *McDonald v. Dickson*, 87 N. C. 404; *Hughes v. Boone*, 114 N. C. 54.

The appeal from the clerk could be heard at chambers in another county: *Ledbetter v. Pinner*, 120 N. C. 455.

Affirmed.

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**JUDGMENTS—CONCLUSIVENESS OF AS EVIDENCE OF DEBT—LIMITATIONS OF ACTIONS.**—A judgment rendered by a court of competent jurisdiction in the regular course of judicial proceedings, without fraud or collusion, is conclusive evidence of the amount and existence of a debt recovered: *Wooten v. Steele*, 109 Ala. 563; 55 Am. St. Rep. 947; *Simmons v. Shelton*, 112 Ala. 284; 57 Am. St. Rep. 39, and note. If the limitation of an action on a judgment is seven years next after its rendition, the right of action upon it is barred after the lapse of that period, notwithstanding the issuance of an execution before the lapse of that time and within seven years preceding the institution of the suit: *Berkson v. Cox*, 73 Miss. 339; 55 Am. St. Rep. 539.

**LIMITATIONS OF ACTIONS—SUIT UPON JUDGMENT—PART PAYMENT.**—A payment made on a debtor's note by the sale of his property on execution, or other legal process, is not such part payment by the debtor as will have the effect of arresting the running of the statute of limitations: *Moffitt v. Carr*, 48 Neb. 403; 58 Am. St. Rep. 696.

## CULBRETH v. DOWNING.

[121 NORTH CAROLINA, 205.]

**LIMITATIONS OF ACTIONS—CHANGE IN REMEDY—REASONABLE TIME FOR BEGINNING ACTION.**—The legislature may change the remedy and the statute of limitations, which applies to the remedy, by extending or shortening the time for beginning an action, provided that, in the latter case, a reasonable time is given therefor before the statute works a bar. Such reasonable time is “the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute.”

J. C. and S. H. MacRae, for the appellant.

N. W. Ray, for the appellee.

**205 FAIRCLOTH, C. J.** This action was instituted to recover damages for ponding water on plaintiff's land by reason of obstruction in a ditch running through defendant's land, which ditch had for a long time carried off such water. It was admitted that the obstructions were in the ditch in March, 1892. On March 8, 1895, the legislature enacted act 1895, chapter 165, that the code, section 155, subdivision 3, be amended by adding, “And when the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter.” His honor intimated that the action was barred, and the plaintiff submitted to a nonsuit and appealed.

For the purposes of this case, the original trespass was in **206** March, 1892, and at the passage of said act of 1895, chapter 165, on March 8, 1895, three years from the trespass in March, 1892, had, within a few days, expired. Prior to the passage of said act, in such cases, the lapse of twenty years was necessary to bar the action, when the presumption of a grant would arise: *Parker v. Norfolk etc. R. R. Co.*, 119 N. C. 677.

The legislature may change the remedy and the statute of limitations, which applies to the remedy, by extending or shortening the time, provided in the latter case a reasonable time is given for the commencement of an action before the statute works a bar: *Nichols v. Norfolk etc. R. R. Co.*, 120 N. C. 495; *Terry v. Anderson*, 95 U. S. 628.

This is the extent to which this court has heretofore gone, and any more rigid rule would seem to be unconstitutional. This rule leaves open the question in each case, what is a reasonable time, and that is objectionable, because it is attended with uncertainty in the minds of litigants and the profession.



We therefore hold that a reasonable time shall be the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years have elapsed before the amending act, then two years more would be a reasonable time. If three years' time would bar the action, and the three years have elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions.

This rule is reasonable and just, as neither party will be deprived of such remedy as he had when the cause of action arose, and neither should take any advantage by the amending act. The plaintiff then can maintain this action, which commenced at April term, 1896.

Error.

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**LIMITATIONS OF ACTIONS—POWER OF LEGISLATURE OVER LIMITATION LAWS.**—Where there is an existing statute of limitations, the legislature may pass an amendatory act which either shortens or extends the time within which an existing cause of action may be barred. Such statute is not unconstitutional as being in conflict with the provisions of the United States constitution, which forbids any state to pass laws impairing the obligation of contracts, if a reasonable time is given for the commencement of an action before the bar takes effect: Monographic note to *Griffin v. McKenzie*, 50 Am. Dec. 391; *Pearce v. Patton*, 7 B. Mon. 162; 45 Am. Dec. 61. Statutes of limitation pertain to the remedy, and not to the essence of the contract, and the legislature, within defined limits, has power to regulate the modes of proceeding in relation to past as well as future contracts: *Briscoe v. Anketell*, 28 Miss. 361; 61 Am. Dec. 553, and note. See *Board of Education v. Blodgett*, 155 Ill. 441; 46 Am. St. Rep. 348, and note; *Hayes v. Douglas County*, 92 Wis. 429; 53 Am. St. Rep. 926.

# FIRST NATIONAL BANK OF SALISBURY v. FRIES.

[121 NORTH CAROLINA, 241.]

**MARRIED WOMEN—PAROL TRUST AGAINST—EQUITABLE LIEN.**—A transaction by which a husband and wife contract for the purchase of a lot, the deed to which is made to the wife, and by agreement deposited with a third person as collateral security for a loan made by him to be used in building a house on such lot, and for which she subsequently gives her note, constitutes a parol trust in favor of the party making the loan to the extent of his debt, which he may enforce in equity by having it declared a lien upon the land, and the land sold for the satisfaction thereof. The wife is not entitled to the delivery of the deed until such loan is paid.

T. F. Kluttz, for the appellants.

L. S. Overman, for the appellee.

**242** **FURCHES, J.** The defendants W. A. Fries and wife, Carrie M. Fries, contracted with the Central Land Company to purchase a vacant lot of land in East Salisbury. By agreement of parties the title to this lot was to be made to the feme defendant. And for the purpose of borrowing money from the plaintiff, it was agreed by the parties that this deed should be deposited by the land company with the plaintiff as collateral security for the payment of the money, which the plaintiff agreed to furnish the defendants to be used in building a house on said lot. The deed was so deposited, and the plaintiff furnished money to defendants from time to time, which was used by them in said building, to the amount of eleven hundred dollars; and the feme defendant afterward executed her note to plaintiff for this amount. The note has not been paid, and the plaintiff brings this action to have its debt declared a lien on this lot, and, if not paid, a sale of the lot and appropriation of the proceeds to the payment of its debt.

**243** The defendants answer and admit the execution of the note, deny the other allegations of the complaint, and the feme defendant prays for the equitable relief, as she calls it, requiring the plaintiff to deliver to her the deed for said lot.

The jury find that the deed was delivered to the plaintiff by the land company, with the consent of the feme defendant, to be held as an "escrow" until this note or the money for which it was given was paid, and that the money borrowed from the bank was used in improvements placed on said lot.

The feme defendant is not personally liable for the payment of this note: *McCaskill v. McKinnon*, 121 N. C. 214. And this

court has repeatedly held that a married woman cannot sell her land except by deed, nor bind the same for the payment of the husband's debts, except by mortgage and privy examination: *Farthing v. Shields*, 106 N. C. 289.

But the feme defendant does not fall within the protection afforded married women by this line of authorities.

When the Central Land Company made the deed to the feme defendant, it was delivered to the plaintiff by the consent of the defendants, to be held by the plaintiff as collateral security for the money that plaintiff agreed to furnish the feme defendant to build a house on the lot, and, when this was paid, to be delivered to her. This was a parol declaration of a trust accompanying the transmission of the legal title, and not subject to the statute of frauds: *Sherrod v. Dixon*, 120 N. C. 60; *Shelton v. Shelton*, 53 N. C. 292. And the feme defendant took the title subject to this trust. She never has had the title to this lot except with this encumbrance upon it. The plaintiff is the holder of the deed, the legal title, though not the legal owner of the lot, under a parol trust in its favor to the extent of its debt. And in this way, it has such an interest as equity will enforce.

The feme defendant in her answer invokes the aid of <sup>244</sup> "equity," and asks that the plaintiff be decreed to deliver this deed to her. "Those who ask equity must do equity." The feme defendant does not own, and never has owned, this lot except with this encumbrance upon it. She never has paid a dollar for it, and does not propose to do so, and we are unable to see in what her equity consists. To grant this prayer, it seems to us, would be to do a very inequitable thing, and would be such a decree as we have no warrant for making.

This court has ever been careful to protect the estates of married women against the machinations and frauds of their husbands and others. But it cannot assist a married woman to practice a fraud by which she will acquire an estate, for which she has not paid and does not propose to pay a dollar. The judgment below must be affirmed.

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**TRUSTS BY PAROL IN REAL PROPERTY.**—A parol declaration of trust, either of real or personal estate, is valid, in the absence of any statute requiring it to be in writing: *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658, and note. But it is held that a trust in land cannot be raised by parol: *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316; *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 420, and note; *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471, and note.

**HUSBAND AND WIFE—PURCHASE OF LAND—ESTOPPEL OF WIFE.**—A married woman who buys lands, and jointly with her



husband executes a mortgage to secure the purchase money, is estopped to deny that the consideration moved from her and that she is liable for such purchase price: Monographic note to Trimble v. State, 57 Am. St. Rep. 173, on estoppel against married women.

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## SIMS v. SIMS.

[121 NORTH CAROLINA, 297.]

**MARRIAGE WITH A LEGALLY DECLARED LUNATIC** is absolutely void ab initio, and may be so declared by the courts in a direct proceeding at any time.

**GUARDIAN AND WARD—LUNATICS.**—The appointment of a guardian for a lunatic is valid until the proceeding under which it is made is reversed.

**INSANE PERSONS—GUARDIAN OF—REMOVAL.**—Ex parte proceedings to have a lunatic declared sane, brought without notice to his guardian, are void, as well as an order made therein removing such guardian without notice.

**MARRIAGE OF LUNATIC—VALIDITY—REMEDY.**—The marriage of a legally declared lunatic is void, and can be validated only by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage if the lunatic is since found to be restored to reason.

**MARRIAGE VOID ON ACCOUNT OF LUNACY** cannot be cured and rendered valid merely by cohabitation with the lunatic after his restoration to reason.

**MARRIAGE AND DIVORCE OF LUNATIC—GUARDIAN'S RIGHT OF ACTION.**—An action for the divorce of a lunatic may be maintained by his guardian in the name of the lunatic.

Action for divorce brought by Nancy E. Sims, by her guardian, W. R. Sprinkle, against W. M. Sims. Judgment dissolving the marriage, and defendant appealed.

W. W. Barber, for the appellant.

Glenn & Manly, for the appellee.

<sup>299</sup> CLARK, J. On November 11, 1893, Nancy E. Sims, under appropriate proceedings begun sometime previous, was duly found by the jury to be mentally imbecile. The jury in the present case find that the alleged marriage with the defendant took place on the 14th of November, 1893. Such marriage is absolutely void ab initio and can be at any time so declared by the courts: Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447, which has been often cited and approved (Womack's Digest No. 2005) and of late years in Webber v. Webber, 79 N. C. 576, and Baity v. Cranfill, 91 N. C. 298; 49 Am. Rep. 641. The power of the courts to declare marriages a nullity for incapacity of one

of the parties, though not an adjudged lunatic at the time of the marriage, is also held in *Johnson v. Kincade*, 37 N. C. 470; *Setzer v. Setzer*, 97 N. C. 252; 2 Am. St. Rep. 290; *Lea v. Lea*, 104 N. C. 603; 17 Am. St. Rep. 692. This might be done even after the death of parties (*Gathings v. Williams*, 27 N. C. 487, 44 Am. Dec. 49, though issue could not be bastardized), but it must be done in a direct proceeding, as in this case, and not incidentally: *Williamson v. Williams*, 56 N. C. 446. Such action is for a divorce (*Lea v. Lea*, 104 N. C. 603; 17 Am. St. Rep. 692), and all actions for a lunatic can be brought either in the name of the guardian or in the name of the lunatic by the guardian: *Crump v. Morgan*, 38 N. C. 91; 40 Am. Dec. 447; *Shaw v. Burney*, 36 N. C. 148.

W. L. Sprinkle, son of Nancy E. Sims, was duly appointed her guardian after the aforesaid inquisition of lunacy, and such proceedings and orders are "valid until reversed or superseded": *Bethea v. McLennon*, 23 N. C. 523. The <sup>300</sup> ex-parte proceedings brought by the husband in 1895 to have the wife declared sane were without any notice or service upon the guardian to whom the law had confided the protection of her rights, and hence were a nullity (Code, sec. 217, subd. 3), as was also the subsequent order, founded thereon, removing him without notice. Indeed, the marriage at the time of a legally declared lunacy, being a nullity, could only have been remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage if the lunatic is since found to be restored. The void marriage on account of lunacy could not be cured merely by cohabitation after restoration. Marriages entered into by parties under the legal age, however, being not void but voidable, can be validated by cohabitation after arrival at the marriageable age: *State v. Parker*, 106 N. C. 711; *Koonce v. Wallace*, 52 N. C. 194.

His honor correctly adjudged that W. R. Sprinkle was authorized to bring this action. There is no other exception. As to the argument that the record does not affirmatively show that the report of the jury had been "received and confirmed" it is not required. The code, section 1670, only requires the clerk to "file and record" it. But if it had been a case in which the court was empowered to confirm the report, as the clerk acted on it by appointing the guardian, the confirmation would have been presumed in the absence of evidence to the contrary, on the maxim, *Omnia presumuntur rite acta*. The jury found, further,

that Nancy E. Sims did not have mental capacity to enter into the marriage with the defendant on the 14th of November, 1893, but this was unnecessary, as the marriage with a declared lunatic was ipso facto void: *Crump v. Morgan*, 38 N. C. 91; 40 Am. Dec. 477.

Affirmed.

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**MARRIAGE AND DIVORCE—DIVORCE OF INSANE PERSON AT INSTANCE OF GUARDIAN.**—It is now established by the weight of authority, both in this country and in England, that a suit for divorce may be prosecuted by or against the guardian or committee of an insane person, where the act for which the divorce is sought was committed by the defendant before he or she became insane: Extended note to *Kimball v. Kimball*, 82 Am. Dec. 200. For a late case denying that the guardian of an insane person may maintain an action for divorce on behalf of his ward, see *Mohler v. Shank*, 93 Iowa, 273; 57 Am. St. Rep. 274, and note.

**MARRIAGE AND DIVORCE—INSANE PERSONS—RATIFICATION.**—The marriage of a lunatic is absolutely void: *Crump v. Morgan*, 3 Ired. Eq. 91; 40 Am. Dec. 447, and note. Marriage is a civil contract, and may be avoided, like other contracts, for want of sufficient mental capacity in the parties. If, at the time of attempting to contract, the mind is unsound, it is incapable of that consent which is necessary to the validity of the contract: *Cole v. Cole*, 5 Sneed, 57; 70 Am. Dec. 275, and note. See *Powell v. Powell*, 18 Kan. 371; 26 Am. Rep. 774. Regardless of the general rule that void contracts are incapable of ratification, it has been held that if an insane party to a marriage recovers his reason, and, with a full knowledge of the facts, ratifies what was done, the marriage thereby becomes valid. This, however, has been denied: Monographic note to *Gathings v. Williams*, 44 Am. Dec. 56.

**GUARDIAN AND WARD—CONCLUSIVENESS OF JUDGMENT—REMOVAL OF GUARDIAN.**—The judgment of a court having original jurisdiction of guardianship matters is conclusive until reversed, modified, or impeached: *Deegan v. Deegan*, 22 Nev. 185; 58 Am. St. Rep. 742. A judgment of such court appointing a guardian cannot be questioned collaterally: *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. The removal of guardians is generally regulated by statute in the United States: Note to *Matter of Van Houten*, 29 Am. Dec. 715.



**BROADFORD v. FAYETTEVILLE.**

[121 NORTH CAROLINA, 418.]

**CONSTITUTIONAL LAW — DISCRIMINATION — EQUAL PROTECTION—OWNERS OF STOCK RUNNING AT LARGE.**—A statute providing that resident owners of stock found running at large in a town shall pay a greater penalty therefor than nonresident owners is a mere police regulation and not unconstitutional as granting exclusive privileges to a set of men, nor as denying to anyone the equal protection of the laws.

The plaintiff, who lived within a mile beyond the corporate limits of the town of Fayetteville, brought this action to recover his cow which had been impounded by the authorities of such town and was held in default of the payment of poundage. The statutes of North Carolina for 1895, chapter 154, prohibited said town, among others, from charging nonresident owners for stock found running at large in such town more than one-fourth of the penalty charged resident owners, and relieved entirely from the penalty nonresident owners of stock running at large who lived more than a mile from the corporate limits of the town. Plaintiff tendered the sum of twenty-five cents to regain possession of his cow, but this tender was refused. Defendant contended that the statute in question was unconstitutional and void. Judgment for plaintiff, and defendant appealed.

H. McD. Robinson, for the appellant.

G. M. Rose, for the plaintiff.

419 CLARK, J. It was admitted by both parties that the result of this appeal depended upon the constitutionality of chapters 141 and 154 of the acts of 1895. These two acts are substantially identical, save that the first applies to the whole state, while the latter is applicable to Cumberland county only. The first section is aimed at the offense of driving livestock into a city, town, or other territory in which livestock are forbidden to run at large, with intent to secure the penalty or to injure the owner, or for hire or reward. Violation of this statute is made a misdemeanor. The second section, presumably with the object of discouraging the perpetration of the offense denounced in the first section, provides that the poundage or penalty upon the stock of nonresidents of a town or city, which is authorized to impound stock running at large therein, shall not be more than one-fourth that levied upon residents, and further that when nonresident owners of cattle taken up in said town live

more than a mile from said city limits, there shall be no poundage charged. Chapter 141 differs from chapter 154 in that it exempts such last named owners of stock, not altogether, but only for the first three times that the same cattle are impounded. But chapter 154, which applies to Cumberland county only, governs in this case, as it was ratified later.

It was seriously argued to us that these acts are unconstitutional, because in violation of article 1, section 7, of the constitution of North Carolina, which forbids exclusive privileges <sup>420</sup> and emoluments to be granted to any set of men. Then, it was further urged that the acts were obnoxious to the inhibition of the fourteenth amendment to the constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of its laws. We find in the statute, however, no violation by the legislature of the organic law of the state or the United States, but simply a police regulation. The act is based upon the idea that residents of the town, who know that stock are not allowed to run at large therein, are more blamable for permitting them to do so than nonresidents whose stock (turned out where it is permissible) by chance, or perhaps driven by someone who wishes to make a profit thereby or injure the owner (as is indicated by the first section of the act), get into the town limits and violate the majesty of its ordinances.

The statute further takes cognizance of the ordinary things of life in proceeding upon the assumption that the stock of owners living more than a mile from town are so little disposed to leave their native meadows and ranges in order to tramp the barren streets and sidewalks of the distant town; that their doing so is not attributable to negligence in their owners, and is more likely to be caused by designing persons. Hence, in the county of Cumberland, such distant owners are not punishable at all, and under the general act, chapter 141, only when the same stock have developed such fondness for the town as to have been caught parading its streets three times before.

In these provisions we see no "exclusive or separate emoluments or privileges" to any set of men. It was once contended that nonresidents, not being subject to town regulations, were not liable at all when their stock invaded the town limits. But it was held that they were, as legislation then stood: *State v. Tweedy*, 115 N. C. 704; *Rose v. Hardie*, <sup>421</sup> 98 N. C. 44; *Whitfield v. Longest*, 28 N. C. 268; *Hellen v. Noe*, 25 N. C. 493. But

in this there was no denial of the power of the legislature to provide that owners of cattle which should stray a mile or more to get into the town limits (which they were so little likely to do of their own volition or by that of their owners) should be exempt from the penalty visited upon residents of the town, who should negligently or intentionally let their cattle roam the streets, and that those living outside the town limits, but within a mile, should be punished less than residents of the town. The latter know that their stock must roam the town if turned out at all. Nonresidents do not. It has never been held that the special privileges and advantages given the residents of towns by town charters come within the constitutional inhibition against special privileges, and neither can it be justly contended that an exemption, partial or entire, of nonresidents from the penalty for violation of a town ordinance by their stock is unconstitutional. Residents in the country receive none of the benefits, and if they are made exempt from some of the burdens, of the towns which depend upon them for existence and support, the grievance, if any results, must be removed by the legislature.

Still less is this legislation obnoxious to the "fourteenth amendment" which is now invoked on all occasions, and, if given the scope which has been claimed for it, would swallow up the jurisdiction of the state courts as to every matter. It would be like the old fiction of *quo minus* by which, in England, the exchequer court, which had jurisdiction only over matters touching taxation, drew into itself both common law and equity jurisdiction of all other actions (which it was not intended to have), upon the fiction that by committing any injury or damage upon the plaintiff, or failing to pay a debt due him, *quo minus sufficiens existit*, he is less able to pay his taxes: 3 Blackstone's Commentaries, 45. But this attempt to make a modern *quo minus* and an Aaron's rod of a constitutional <sup>422</sup> amendment, which was enacted to protect a recently emancipated race from inequality before the law, has been so often rebuked by the supreme court of the United States that it is only necessary to cite a few cases: *Slaughter House Cases*, 16 Wall. 36; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 188; *In re Kemmler*, 136 U. S. 448. "Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment": *Barbier v. Connolly*, 113 U. S. 32. It "does not prohibit legislation which is limited either in the objects to



which it is directed or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions": *Hayes v. Missouri*, 120 U. S. 71. In *Missouri Ry. Co. v. Mackey*, 127 U. S. 207, the court held that a statute of Kansas, making railroads responsible for injuries sustained by their employes when caused by the negligence of fellow-servants, was valid and not forbidden by the fourteenth amendment, although the act did not apply to any other corporations than railroads, nor to other employers. The same ruling was made, as to a similar statute in Iowa, in *Minneapolis etc. Ry. Co. v. Herrick*, 127 U. S. 210, and has been cited and approved in *St. Louis etc. Ry. Co. v. Mathews* (November, 1896), 165 U. S. 1. which reviews the whole subject and holds, citing many decisions, that as a rule statutes making classifications are not forbidden by the fourteenth amendment, when they bear equally upon all within each class.

Accordingly it has been often held in this court that a public local act making that an offense in one district which is not so in another is a constitutional exercise of the police power, if the act bears alike on all persons within a defined locality, and is within the discretion of the legislature, as local prohibition acts: *State v. Joyner*, 81 N. C. 534; *State v. Stovall*, 103 N. C. 416; *State v. Barringer*, 110 N. C. 525; <sup>423</sup> *State v. Snow*, 117 N. C. 774; or restricting the sale of seed cotton in certain localities: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696.

Here, three districts are created, i. e., the town limits, the territory within one mile of the town limits, and the territory beyond the one mile. The law is uniform and bears alike upon the residents within each of the designated districts. It is not a discrimination between persons, but a statute applying differently to different districts. A somewhat similar instance is the dividing a city into small districts for local assessments for improvements, those in each district being taxed at a different rate from those in others: *Raleigh v. Peace*, 110 N. C. 32; *Hilliard v. Asheville*, 118 N. C. 845; *Walston v. Nevin*, 128 U. S. 578. While not exactly analogous, the decisions on this point demonstrate that such and similar matters are not withdrawn from legislative action by any prohibition in the state or federal constitution.

No error.

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STATUTES—ESTRAY LAWS—POWER OF LEGISLATURE TO PASS.—Animals running at large or trespassing are a nuisance, and the power to abate the nuisance by impounding the animals is gen-

erally conceded as among the police powers of the state: *Monographic note to Blair v. Forehand*, 97 Am. Dec. 88. The terms "estrays" and "running at large" are applied to animals in the highway not in the custody or under the control of any person: *Extended note to Stewart v. Hunter*, 8 Am. St. Rep. 272. See *Wilson v. Beyers*, 5 Wash. 303; 34 Am. St. Rep. 858, and note.

**POLICE POWER—LIMITS OF.**—The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action as manifestly to secure, or tend to the comfort, prosperity, or protection of the community: *People v. Ewer*, 141 N. Y. 129; 38 Am. St. Rep. 788. It cannot invade the rights of persons and property under the guise of a mere police regulation, when such is not its effect: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; note to *Maple v. John*, 57 Am. St. Rep. 846.

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## CALDWELL v. WILSON.

[121 NORTH CAROLINA, 480.]

**JURISDICTION TO SET ASIDE SUPERSEDEAS.**—The supreme court of North Carolina has no jurisdiction to set aside, or to pass upon the regularity of, a writ of supersedeas issued by the supreme court of the United States.

**QUO WARRANTO—EFFECT OF JUDGMENT IN.**—In a proceeding by quo warranto to try title to an office to which the relator has been appointed, a judgment of the state supreme court in his favor, *ex proprio vigore*, upon being filed, places him in possession of the office, with the right to exercise the duties thereof and draw the salary attached thereto from the time of his appointment, without the issue of execution for that purpose, but, if execution is unnecessarily issued, it cannot be recalled upon motion of the defendant.

**QUO WARRANTO—CONCLUSIVENESS OF JUDGMENT.**—A judgment of the state supreme court in quo warranto proceedings to try the title to an office, in favor of a relator who has been appointed to, and qualified for, such office, is not superseded by a writ of error from the supreme court of the United States, whether regular or irregular.

**CONTEMPT IN QUO WARRANTO PROCEEDINGS.**—If the relator is in office by virtue of a judgment of the supreme court of the state in quo warranto proceedings, any attempt by the defendant to exercise the functions of such office, or to interfere with the full and free exercise thereof by the relator, or any attempt by anyone else to interfere by alleged legal process or otherwise, before such judgment is reversed, is a contempt of court.

The judgment in the case of *Caldwell v. Wilson*, 121 N. C. 425, an action of quo warranto to try the title to an office, was handed down at 4:30 P. M. of December 23, 1897, and at 5:30 P. M. of the same day the relator obtained a writ of execution directed to the sheriff and commanding him to put the relator in possession of the office of railroad commissioner, together with all property, papers, and effects belonging thereto, and to oust the defendant therefrom. At 7:10 P. M. of the same day the de-

defendant filed a writ of error, bond, etc., to the supreme court of the United States with copies of the writ for the state and for the relator. On December 24, 1897, the relator made a motion in open court to set aside the supersedeas and writ of error filed or to adjudge them irregular. Defendant also moved the court to recall said execution. On the same day, the court filed the following opinion:

A. C. Avery, Armfield, Turner & Cowles, and W. J. Montgomery, for the relator.

R. O. Burton, J. D. Shaw, T. N. Hill, J. C. L. Harris, A. Burwell, and J. G. Bynum, for the defendant.

<sup>482</sup> CLARK, J. This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms, and other tangible property belonging to the railroad commission. The relator moved to set aside the supersedeas proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this court *ex proprio vigore* placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached from the date of his <sup>483</sup> appointment. The judgment took effect immediately upon being filed, and is not superseded by the subsequent writ of error, regular or irregular: *Foster v. Kansas*, 112 U. S. 201. The relator being in office by virtue of the judgment of this court, any attempt by the defendant to exercise its functions, or to interfere with the full and free exercise thereof by the relator, and any attempt by anyone else to interfere by alleged legal process or otherwise, unless and until the supreme court of the United States shall reverse the judgment of this court, will be a contempt of this court. We decline to make any order recalling the execution.

Both motions refused.

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JURISDICTION—CONFLICT BETWEEN STATE AND FEDERAL COURTS.—The state and federal government, while they are distinct parts of a complete system, are each supreme within the limits of the authority confided to them; each government is possessed of a judiciary power commensurate with its own objects and purposes, and partaking of its supreme authority; and the exercise of the judicial power in each is confided to the tribunals of the respective



governments, and they can never come in conflict while they exercise only the authority which rightfully belongs to each: Extended note to *Gilman v. Williams*, 76 Am. Dec. 223. As between state courts and United States courts, neither can enjoin the process of the other: *Chapin v. James*, 11 R. I. 86; 23 Am. Rep. 412. Where the United States court and a state court have a concurrent jurisdiction, the court first acquiring jurisdiction of any matter retains it, to the exclusion of the other: *Hines v. Rawson*, 40 Ga. 356; 2 Am. Rep. 581. See *Wilkinson v. Wait*, 44 Vt. 508; 8 Am. Rep. 391; monographic note to *Plume etc. Mfg. Co. v. Caldwell*, 29 Am. St. Rep. 310-318; *In re Copenhagen*, 118 Mo. 377; 40 Am. St. Rep. 382.

**QUO WARRANTO—JUDGMENT IN—EFFECT OF APPEAL.**—If a judgment is entered in a quo warranto to the effect that the relator is entitled to an office held by the defendant, an appeal, though accompanied by a stay bond, does not deprive the relator of the right to the immediate possession of the office. Such a judgment is self-executing, and deprives the person against whom it is of all official duty, and completely excludes him from the office as long as the judgment remains in force: *Fawcett v. Superior Court*, 15 Wash. 342; 55 Am. St. Rep. 894, and note. Contra, *Morton v. Broderick*, 118 Cal. 475; *Covarrubius v. Supervisors*, 52 Cal. 622. Both the title of the party in possession of the office, and that of the party claiming a right thereto, will be determined in an action in the nature of a quo warranto: *People ex rel. Smith v. Pease*, 27 N. Y. 45; 84 Am. Dec. 242. In *Foster v. Superior Court*, 115 Cal. 279, it was held that upon an appeal from a judgment rendered in the superior court upon the contest of an election for directors of a railway company, as between two contestants, all proceedings upon the judgment are stayed upon the execution of the ordinary appeal bond; and the court cannot enforce its judgment pending an appeal notwithstanding it purports to enjoin the other directors from interfering with the one declared elected, in the exercise of his office; and the superior court has no power pending such appeal to punish such interference as contempt.

**EFFECT OF APPEAL AND OF RIGHT TO APPEAL** upon the force of a judgment as *res judicata* is discussed in the note to *Naftzger v. Gregg*, 37 Am. St. Rep. 29-32.

## PLEASANTS *v.* RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY.

[121 NORTH CAROLINA, 492.]

**MASTER AND SERVANT—FELLOW-SERVANTS.**—The conductor on a sidetracked train upon whom devolves the duty to close the switch and give the signal "all right" for the passage of another train on the main line is the fellow-servant of the engineer of the main line train, when both are employed by the same company.

**RAILROADS—NEGLIGENCE—OPEN SWITCH AS EVIDENCE OF.**—The fact that a railroad switch is left open, whereby an accident occurs to a passing train resulting in personal injury, is not evidence of a defect in the roadbed and consequent negligence on the part of the railroad company.

**RAILROADS—NEGLIGENCE OF EMPLOYÉ—PRESUMPTION.**—Evidence that the conductor of a freight train, who had

been employed as such for about three weeks, negligently left a switch open, resulting in the wreck of a passing train and personal injury, is sufficient to raise a presumption of negligence against the railroad company in the employment of an incompetent servant, and presents an issue which should be presented to the jury for determination under proper instructions.

RAILROADS — NEGLIGENCE — SIGNALS — INSTRUCTIONS.—On the trial of an action to recover for personal injury resulting from the negligence of a railroad employé in giving an "all right" or "go ahead" signal to a passing train when the switch was open, thereby causing a wreck, it is error to instruct the jury that, "it being admitted that the switch was capable of bearing a signal light which would have shown red when the track was unsafe, it was the duty of the company to use such signal light upon the switch."

L. R. Watts, McRae & Day, and J. B. Batchelor, for the appellant.

R. O. Burton, for the appellee.

<sup>493</sup> FURCHES, J. On the 30th of January, 1896, the plaintiff and one Dunn were both in the employ of the defendant—the plaintiff as locomotive engineer on a freight train, and Dunn as conductor of a freight train. On that day the plaintiff was operating a train running from Monroe, north <sup>494</sup> to Raleigh, and Dunn was running his train from Raleigh, south. These trains should have passed each other at a station on the defendant's road, called Manly, but, by the fault and negligence of Dunn, the plaintiff's train ran into Dunn's train, and the plaintiff was badly injured. There were sidetracks at Manly, and, when plaintiff's train reached that station, plaintiff found Dunn's train there, standing on the sidetrack; and, being too long for one sidetrack, it had been divided into two sections, and one of these placed on either side of the main track. Rule 94 a of the defendant company required the conductor or flagman of the train first reaching stations where it was necessary to sidetrack for a passing train, that is, made it the duty of Dunn or a flagman, to close the switch of the sidetrack after moving the train off the main line, and, when the switch was closed and secured, to signal the approaching train on; that is, to give the "all right" signal, and the approaching train passes on without stopping. When the plaintiff reached Manly with his train, he found Dunn's train on the sidetrack, Dunn standing at the switch. When Dunn gave him the "all right" signal, the plaintiff drove his train forward. But, instead of the switch being closed as it should have been, it was left wide open, and a fearful crash took place in which the plaintiff was terribly injured and much other damage done. Dunn had only been employed as such conductor

three or four weeks. The plaintiff claims that upon these facts the defendant is liable to him in damages for the injuries he received.

In the first place, the plaintiff denies that he and Dunn were fellow-servants of defendant company, and alleges that Dunn was his vice-principal. Plaintiff also contends that his injuries were caused by reason of a defective roadbed, or track, for which defendant is liable without reference to the question of vice-principal. He also contends that <sup>495</sup> defendant negligently and carelessly employed Dunn as conductor, who is negligent and incompetent to perform the duties of his position, and he was thereby injured. If either of these positions is sustained, the judgment of the court below should be sustained, unless error was committed on the trial.

In the catholic sense of the term, the plaintiff and Dunn were fellow-servants. They were both employed by and in the service of defendant company: *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143; *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174; 99 Am. Dec. 615; *Warner v. Erie Ry. Co.*, 39 N. Y. 468; *Wharton on Negligence*, sec. 229; *Cooley on Torts*, 543; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478. The same doctrine is held in *Hobbs v. Atlantic etc. R. R. Co.*, 107 N. C. 1; *Hagins v. Cape Fear etc. Ry. Co.*, 106 N. C. 537; *Webb v. Richmond etc. R. R. Co.*, 97 N. C. 387; *Kirk v. Atlanta etc. Ry. Co.*, 94 N. C. 625; 55 Am. Rep. 621.

In *Rittenhouse v. Wilmington Street Ry. Co.*, 120 N. C. 544, it is held that the motorman and a track superintendent in the employ of the same company are fellow-servants.

In *Ponton v. Wilmington etc. R. R. Co.*, 51 N. C. 245, a case very similar to this, where a switch had been left open by the operators of the train that had sidetracked to let another train pass, and the passing train ran into the train on the sidetrack and injured an employé on the train sidetracked, *Ruffin, C. J.*, delivering the opinion of the court, said, that they were fellow-servants and the action could not be maintained. So, to enable the plaintiff to recover upon the first ground assigned, it must not only appear that plaintiff and Dunn were fellow-servants, but it must also appear that Dunn was the vice-principal of the plaintiff. That is, that Dunn was the superior of the plaintiff and had the power to dismiss the plaintiff from his employment: *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

*Purcell v. Southern Ry. Co.*, 119 N. C. 728, holds that a con-



ductor <sup>496</sup> on an independent train is the vice-principal as to a brakeman on that train.

Shadd v. Georgia etc. R. R. Co., 116 N. C. 968, holds that the conductor is a vice-principal as to those on his train subject to his orders.

It is said in Mason v. Richmond etc. R. R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, that the conductor on the train is not a fellow-servant of a person employed in coupling cars. By this statement, which is not necessary to the decision of the case, we understand the court to mean that the conductor in this case was the vice-principal of the person coupling cars.

But none of these cases sustain the plaintiff's contention that Dunn was his vice-principal. They all relate to conductors and the employes on that train, who are under and subject to his command. That is not the case here. But to show more clearly that Dunn was not the vice-principal—the superior officer of the plaintiff—we see that the rule referred to (94 a) provides that this work—closing the switch and giving the signal “all right”—may be done by Dunn or by a flagman on Dunn's train. Suppose it had been the flagman on Dunn's train that stood by the switch and gave the signal “all right,” would it be contended that he was the superior and the vice-principal of the plaintiff? If not, can it be contended that Dunn, doing the work of a flagman, was the plaintiff's vice-principal? The plaintiff must fail on this contention.

The next contention is, that the defendant is bound to keep its roadbed in good condition, and that this is a duty devolving upon it that cannot be delegated; and the fact that this switch was not closed was a defect in the defendant's roadbed that caused the plaintiff's injury, and that the defendant is liable to him in damages on this account. But this contention cannot be maintained. There was no defect in the roadbed. It was sound and in good condition, <sup>497</sup> and was not the cause of the plaintiff's injury. That was the result of the carelessness or the incompetency of Dunn, and the defendant is not liable unless it can be made so through the negligence or incompetency of Dunn. This we have seen he cannot do, unless he was negligently employed by the defendant.

The plaintiff's next contention is, that Dunn was negligent and incompetent when employed, and that the defendant knew this, or could have known it by the exercise of reasonable care, which was not exercised, in his selection and employment.

There was no evidence that the defendant knew of the incompetency of Dunn when he was employed, except his action on the occasion of this fearful wreck, and the fact that he had not been employed in this capacity more than three or four weeks. These facts raise such presumptions against the defendant as to make this an issue fit to be submitted to the jury under proper instructions from the court: *Lee v. Michigan Cent. R. R. Co.*, 87 Mich. 575; *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458; *Keith v. New Haven etc. Co.*, 140 Mass. 175; *Bailey on Liability for Injury to Servants*, 46-56.

The court, among other things, charged the jury as follows, to which the defendant excepted: "1. That the conductor Dunn and the plaintiff under the evidence were not fellow-servants; 2. That Dunn, in his duty of managing the switch and giving the signal to plaintiff, represented the defendant in the performance of absolute duties which the company owed to the plaintiff, and his negligence, if any, was the negligence of the company and not of a fellow-servant; 3. That Dunn, in his duty of signaling to the plaintiff when the track was clear, represented the company in the <sup>498</sup> performance of an absolute duty which the company owed to the plaintiff, and, if he was negligent, it was the negligence of the company and not of a fellow-servant; 4. That, it being admitted that the switch was capable of bearing a signal light, which would have showed red when the track was unsafe, it was the duty of the company to use such signal light upon the switch."

There was error in these instructions for which the defendant is entitled to a new trial.

New trial.

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#### RAILROAD COMPANIES—FELLOW-SERVANTS—WHO ARE.—

While, in a loose, general sense, all agents and servants of a corporation, without reference to rank or dignity, are common employes, they are not all fellow-servants in the sense which relieves the corporation from liability for the negligence of one resulting in the injury of another: *Taylor v. Georgia Marble Co.*, 99 Ga. 512; 59 Am. St. Rep. 238, and note. A brakeman of a railway train, and a telegraph operator in charge of a signal station, with full authority to control the running of trains, and to whom all brakemen owe the duty of obeying his orders, are not fellow-servants. The former may, therefore, recover of the common employer for injuries sustained through the negligence of the latter in giving a signal for a train to proceed when the track is occupied by another train: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va., 436; 52 Am. St. Rep. 896, and note; *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note.

#### RAILROAD COMPANIES—PRESUMPTION OF NEGLIGENCE—LIABILITY FOR ACT OF SERVANT.—

If the circumstances of an accident are such that it may fairly be inferred from them that the

reasonable probability is that the accident was caused by the failure of a party to exercise a proper precaution, a presumption of negligence arises: Note to Chicago Street Ry. Co. v. Rood, 54 Am. St. Rep. 483. See Pennsylvania R. R. Co. v. Middleton, 57 N. J. L. 154; 51 Am. St. Rep. 597, and note.

**RAILROAD COMPANIES—INJURIES TO SERVANTS—DEFECTIVE APPLIANCES.**—It is not the duty of a railroad company to discard reasonably safe machinery, and to adopt a new device for the safety of its employes, until, by its general use, or otherwise, its superiority has been established: Gulf etc. Ry. Co. v. Walker, 70 Tex. 126; 8 Am. St. Rep. 582, and note. It is bound to furnish suitable switches and competent servants to operate them, but the actual operation of the switches is a duty belonging to the employes of the company, and, for the negligent performance of that duty by one servant, to the injury of another employed in the same general business, the company cannot be held liable: Davis v. Southern Pac. Co., 98 Cal. 19; 35 Am. St. Rep. 132.

## MORGANTON MANUFACTURING COMPANY v. OHIO RIVER AND CHARLESTON RAILWAY COMPANY.

[121 NORTH CAROLINA, 514.]

**CARRIERS.—BILL OF LADING** stamped on its face with the word "released" exempts the carrier from his common-law liability as an insurer.

**CARRIERS—A BILL OF LADING IS BOTH A RECEIPT AND A CONTRACT.**—As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing, cannot be explained, nor its legal effect changed by parol evidence, in the absence of fraud or mistake.

**CARRIERS.—A BILL OF LADING** may, by its terms, exclude the common-law liability of the carrier as an insurer, although it cannot exempt him from liability for negligence.

**CARRIERS.—A BILL OF LADING AS A RECEIPT** is an acknowledgment of the quantity, character, and condition of the articles delivered and received, and as such may be explained, varied, or contradicted like other receipts.

**CARRIERS—CONNECTING LINES—PRESUMPTION OF NEGLIGENCE.**—If a connecting carrier receives goods from a preceding carrier apparently in good condition, and marks the bill of lading therefor "O. K.," a rebuttable presumption is raised that damage to the goods, if any, occurred on his line.

**CARRIERS—CONNECTING LINES—DAMAGE TO GOODS—PRESUMPTION.**—Among connecting lines of carriers, the one in whose hands goods in transit are found damaged is presumed to have caused such damage, and the burden of proof is upon him to rebut such presumption.

**CARRIERS—CONNECTING LINES—LIABILITY—NEGLIGENCE.**—If the condition of the contents of a case of goods is unknown to a carrier or connecting carrier when it receives it for transportation, a failure to guard against liability for the condition of such goods by examination or stipulation is negligence.



P. J. Sinclair, for the appellant.

S. J. Ervin and E. J. Justice, for the appellee.

<sup>515</sup> FAIRCLOTH, C. J. A box of plate glass was shipped from <sup>516</sup> New York City to Marion, North Carolina. The Pennsylvania Railroad Company, the initial carrier, received and transferred the case to the Norfolk & Western Road at Hagerstown. Then the car containing the box was transferred at Roanoke to the Cape Fear & Yadkin Valley road and by them brought to the Seaboard Air Line Road at Sanford with the seal of the latter on the car at Shelby, North Carolina. At that place the agent of the defendant broke the seal and checked off the contents of the car on the waybill and examined the box and found it in apparent good order. He said in his testimony that there were no marks of rough usage on the outside of the box—that he took a copy of the waybill and delivered it to the defendant's conductor, who carried the car and copy of the waybill to Marion, and that he (the agent) marked the waybill O. K.; also that he did not examine the contents of the box, and that his company did not require him to give a receipt for freight transferred to defendant from connecting lines. The defendant's agent at Marion testified that he received the box, and that the glass was not damaged in taking it off the car, nor while it was in the depot at Marion; that ten days thereafter he and plaintiff's agent opened the box and found the glass badly damaged. A contractor and builder examined the box, and said it must have fallen and struck something hard, causing the break in the glass.

The agent of the first carrier at New York sent a bill of lading with the package, stamped on its face "Released," and gave a receipt for the box "in apparent good order (contents and condition of contents unknown) to be transported to and delivered at the regular freight station of the company at ———, subject to all the conditions," etc., among which were these words: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route," etc. This action is against the terminal carrier.

<sup>517</sup> The defendant contends that it is not liable unless it be shown that the damage occurred on its line, and that there is no evidence that that was so.

We understand "released" to mean exemption from the common-law liability as an insurer. It seems to be agreed that O. K. means all right or in good condition: *Baxter v. Ellis*, 111

N. C. 124. It must be admitted that the present system of rapid transit, consisting of through lines, connecting lines, associated lines, and the like, makes it difficult in some cases to locate the line on which the damage occurs, and it would seem practicable for the interested line to make some arrangement for their own benefit and the public convenience by prorating the freight charges and also the damages, when they cannot be located, and thereby avoid the inconvenience of actual inspection at every transfer, which would not be only inconvenient and cause much delay but serious loss to the consignee.

This case illustrates the difficulty. The glass, being very thick, could not have been broken without a severe jar, and, looking at the evidence, it is scarcely possible to see where or how it occurred.

The case does not fall within the principle of *Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693, 56 Am. St. Rep. 682, where it was held that the associated companies were partners, and each one liable for the negligence of either of the other lines. We are not required to discuss the liability of the other lines which handled the package of glass. The first discovery of damage was when the goods were at the terminal point of the defendant's line.

A bill of lading is something more than a simple receipt. It is a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements <sup>518</sup> of the parties, and, being in writing, cannot be explained by parol evidence, and thereby change its legal import, in the absence of fraud or mistake. It also, by the terms of the writing, as in this case, excludes the common-law liability of the carrier, because it is a special contract governed by its own limitations. The bill, as a receipt, is an acknowledgment of the quantity, character, and condition of the articles delivered and received, and as such may be explained, varied, or contradicted like other receipts. This exemption from the common-law liability may be enforced, if it be reasonable and does not involve exemption from negligence: *Ray's Negligence of Imposed Duties*, 93-95; *Pol-lard v. Vinton*, 105 U. S. 7; *Elliott on Railroads*, sec. 1415.

The defendant's agent having received the box apparently in good condition and marked the bill of lading "O. K." was an adoption of the terms and conditions specified in writing by the

initial carrier, and these facts raise a rebuttable presumption that the damage occurred thereafter. The defendant endeavored to meet and overcome this presumption with evidence, and went to the jury with his evidence. The court charged the jury that among connecting lines the carrier, in whose hands the property is found damaged, is presumed to have caused the damage, and that the burden is upon the defendant to rebut this presumption and satisfy the jury that the glass was not damaged in its possession. In response to the inquiry of the jury, the court charged them that, if the condition of the contents was unknown to the defendant, liability could have been guarded against by examination or stipulation, and that failure to do so was negligence. This we think was correct according to the authorities and the facts.

The instructions asked for by defendant were not suited to the facts, and ignored the presumption just pointed out, <sup>519</sup> and were properly refused. It has been held that the stipulation above stated is a reasonable one and consistent with public policy: *Phifer v. Carolina Cent. R. R. Co.*, 89 N. C. 311; 45 Am. Rep. 687. It has also been held by this court that, if the contents and their condition be unknown, liability may be avoided by examination or by a stipulation, and that it is negligence in a receiving line not to observe these precautions: *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538.

Affirmed.

**CARRIERS—BILLS OF LADING—NATURE OF—EVIDENCE TO EXPLAIN.**—Bills of lading are both receipts and contracts to carry. In so far as they acknowledge the delivery and acceptance of goods they are mere receipts, and as to the rest they are contracts: *Merchants' etc. Transp. Co. v. Furthmann*, 149 Ill. 66; 41 Am. St. Rep. 265, and note. As receipts, they are explainable as between the shipper and carrier; but parol evidence is not admissible to vary the terms of that portion of them constituting the contract: *Van Etten v. Newton*, 134 N. Y. 143; 30 Am. St. Rep. 630; *Davis v. Central etc. R. R. Co.*, 66 Vt. 290; 44 Am. St. Rep. 852, and note.

**BILLS OF LADING—LIMITATIONS OF CARRIER'S LIABILITY.**—Stipulations in bills of lading restricting the common-law liability of carriers are invalid unless reasonable: *Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348; 58 Am. St. Rep. 795, and note. A common carrier cannot, by special agreement, relieve himself from the consequences of his own negligence, nor limit his liability for losses arising therefrom: *Pittsburg etc. Ry. Co. v. Sheppard*, 56 Ohio St. 68; 60 Am. St. Rep. 732, and note.

**CARRIERS—LIABILITY OF CONNECTING CARRIERS—PRESUMPTION.**—Where goods pass over lines of several carriers, and are injured in transit, the jury, in the absence of direct proof to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first: *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353. Where goods have



been transported by successive carriers and damaged subsequently to shipment, it is presumed, in the absence of evidence, that the damage was caused by the last carrier; but he may overcome this presumption by evidence to the contrary: *Texas etc. Ry. Co. v. Adams*, 78 Tex. 372; 22 Am. St. Rep. 56, and note; *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148; 23 Am. St. Rep. 551. See *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569; 30 Am. St. Rep. 577, and note.

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## STATE v. PERRY.

[121 NORTH CAROLINA, 533.]

**TRIAL—INSPECTION OF PREMISES BY JURY.**—The jury may, in the discretion of the court, be permitted to visit the scene of the *res gestae* in criminal as well as civil cases, whenever it appears to the court that such visit is important for the elucidation of the evidence taken on the trial; but such visit must be jealously guarded, to prevent conversation with third parties, and no evidence must be taken, and, if taken, is ground for a new trial.

**TRIAL—INSPECTION OF PREMISES BY JURY—MISCONDUCT—NEW TRIAL.**—If the jury upon visiting the scene of the alleged crime, question a passer-by and from him, or otherwise, elicit other evidence than that offered upon the trial, this is ground for a new trial, whether such visit of the jury was by leave of court or not.

Indictment and conviction for rape. After sentence of death had been pronounced upon the accused, it came to the knowledge of his counsel that the jury had visited the scene of the alleged crime after the evidence was in and while they were considering the case. The visit was made without the knowledge or consent of the accused, his counsel, or the court. The accused filed an affidavit to this effect, and alleged that the jury on such visit elicited evidence from a passer-by and otherwise obtained evidence not given on the trial. His counsel made this affidavit the basis for a motion to set aside the verdict and for a new trial. The court overruled such motion, and the accused appealed.

C. F. Warren, for the appellant.

Z. V. Webster, attorney general, and J. H. Small, for the state.

535 CLARK, J. In *Jenkins v. Wilmington etc. R. R. Co.*, 110 N. C. 438, it is said: "The granting or refusal of the application for the jury to view the premises is a matter which rested in the sound discretion of the trial judge. On some occasions it may be very useful and indeed almost necessary. . . . The matter is one which must be left to the sound discretion of the

trial judge, by whom such motion should only be granted when it shall seem clear to him that it is required in the interest of justice. But this practice is not to be encouraged." There are some states in which express statutes have been passed recognizing the right to grant a jury of view, but the authority inheres in the courts in the investigation of truth to call in this and other aids, and rests in the discretion of the presiding judge in the absence of constitutional or statutory prohibition. It is upon this principle that maps, photograph, expert evidence, and the like have been admitted without express statutes authorizing it. In the celebrated trial of Professor Webster for the murder of Dr. Parkman, the jury was permitted to see the place where the crime was committed: *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711; and this was also done on the trial of *Cluverius v. Commonwealth*, 81 Va. 787, in both instances there being no statute to authorize it. In *State v. Gooch*, 94 N. C. 987, and other cases it has been the recognized practice in this state. That excellent authority, Wharton's Criminal Pleading and Practice, section 707, says that the jury is permitted to visit the scene of the *res gestae* in criminal as well as civil cases, whenever such visit appears to the court important for the elucidation of <sup>536</sup> the evidence, but the visit must be jealously guarded to prevent conversation with third parties." This is the accepted modern doctrine and is founded on reason, as the object of a trial is to avail of every means to ascertain the truth of the issue, guarding against anything that may muddy its source.

Considered as an authorized inspection of the *locus in quo*, and as such counsel argued it, there was error; for it appears that the jury interrogated a passer-by as to the identity of a certain house whose distance from the scene of the alleged crime was material. The answer may or may not have been correct, and the query was based upon the assumption of a given spot as the immediate locality of the crime which may have been erroneous. While there is a difference between the authorities as to whether or not the prisoner must accompany the jury on their inspection of the premises (*Thompson on Trials*, secs. 886, 887), all concur that evidence cannot be taken on such occasions, the object being merely to present to the jury the scene more vividly than is possible by the description of witnesses, so that the jury may with a better comprehension apply the evidence of the witnesses, which must be taken only in open court and in the presence of the prisoner.

Under the settled practice, showers are appointed by the court to point out the localities merely, and no more, so the jury may apply the evidence received on the trial: Thompson on Trials, sec. 914; Bailey's Practice, 228; Archbold's Practice, 6th Eng. ed., 407; State v. Lopez, 15 Nev. 407.

For a still stronger reason it was error for the jury to receive evidence on this occasion, since in fact it was a view by the jury of the premises not under authority of the court. It ought rather, therefore, to be considered as a charge of misconduct by the jury. There are decisions that the bare fact of the jury having visited the scene of a capital offense <sup>537</sup> with whose trial they are charged, though made without leave of the court, is not, per se, ground for a new trial, but that some prejudice must appear: People v. Hope, 62 Cal. 291. But we are not called upon to pass on that point, as to which authorities conflict, for the interrogation of the passer-by was misconduct calculated to prejudice the prisoner: Hayward v. Knapp, 22 Minn. 5; State v. Lopez, 15 Nev. 407. In the leading case of State v. Tilghman, 33 N. C. 513, it is held that where, "on a trial, the circumstances are such as merely to put suspicion on the verdict by showing not that there was, but that there might have been undue influence brought to bear on the jury, because there was opportunity, the granting or refusing a new trial rests in the discretion of the presiding judge; but, if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, or if they hear other evidence than that which was offered on the trial; in all such cases there has been no trial in contemplation of law, and the court, on appeal, will, as a matter of law, direct a new trial, whether the prisoner was acquitted or convicted." This has ever since been recognized as law, and has been repeatedly cited and approved. The jury having, by their questions to the passer-by, "elicited other evidence than that offered on the trial," it is ground for a new trial equally whether the visit of the jury to the spot was by leave of the court or without such leave.

New trial.

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**TRIAL—VIEW OF LOCUS IN QUO.**—A view of the place where a murder was committed will be permitted on the request of the jury, acquiesced in by the counsel on both sides and by the prisoner: Commonwealth v. Knapp, 9 Pick. 496; 20 Am. Dec. 491; Commonwealth v. Webster, 5 Cush. 295; 52 Am. Dec. 711. Such a view is allowed, not for the purpose of furnishing evidence upon which a



verdict may be found, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court: *Schultz v. Bower*, 57 Minn. 493; 47 Am. St. Rep. 630. The jurors have no right to base their finding on evidence not adduced in court, nor upon a view not authorized by the court: *Peppercorn v. Black River Falls*, 89 Wis. 38; 46 Am. St. Rep. 818. See extended note to *Erwin v. Bulla*, 92 Am. Dec. 342-345.

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## STATE v. MONROE.

[121 NORTH CAROLINA, 677.]

**ASSAULT AND BATTERY—IMPROPER ADMINISTRATION OF DRUGS.**—If a druggist, at the request of a customer, puts an unusual dose of croton oil on a piece of candy, with knowledge or reason to believe that such dose is to be given to a third person as a trick, and not for medicinal purposes, and it is so given to the serious inconvenience and injury of such third person, the druggist is guilty of assault and battery.

Indictment and conviction for an assault and battery. Defendant appealed.

E. Y. Webb and Covington & Redwine, for the appellant.

Z. V. Webster, attorney general, and Adams & Jerome, for the state.

677 FAIRCLOTH, C. J. Will Horn administered to Ernest Barrett a dose of croton oil, and the oil had an injurious 678 effect on Barrett. Defendant admits he sold the oil to Horn, and at his request dropped it into a piece of candy, but says he did not know that these parties were playing practical jokes on each other, and did not know for what purpose Horn wanted the oil. Another witness testified that defendant said that Horn said he wanted the oil "for a fellow." Defendant denied saying this. Another witness testified to the quinine episode and to Barrett's and Horn's tricks with each other. Defendant testified that he knew that, a day or two before, Horn had given Barrett a dose of quinine as a joke, in lemonade. There were other witnesses on these matters.

Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, not as an accessory. His guilt, then, depends upon whether he knew or had reason to believe that the dose was intended for Barrett or some other person as a trick, and not for medicinal purposes.

The whole evidence was submitted to the jury who rendered a verdict of guilty. His honor instructed the jury that when the

defendant sold the oil, if he "knew or had reason to believe, and did believe, that it was intended for Barrett or some other person by way of a trick or joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery."

He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection, and we think it covers the substance of the defendant's prayers proper to go to the jury. There was no exception to the evidence. For duties of druggists, see Code, secs. 3143-3145.

Affirmed.

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**ASSAULT—WHAT CONSTITUTES—LIABILITY FOR.**—There may be actionable assault and battery, although there is no actual or specific intent to commit that offense: *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76, and note; *Vosburg v. Putney*, 80 Wis. 523; 27 Am. St. Rep. 47. An assault involves every attempt or offer to do corporal hurt to another with force or violence. Note to *Markley v. Whitman*, 35 Am. St. Rep. 561. It may be assault to strike the horse which another is driving: *Clark v. Downing*, 55 Vt. 259; 45 Am. Rep. 612. Malice and criminal intent may be inferred from recklessness or wanton disregard of human life: *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76, and note. When a party, by an act which he could have avoided, and which he cannot justify, inflicts an immediate injury upon another by force, he is legally answerable in damages to the party injured: *Goldsmith v. Joy*, 61 Vt. 488; 15 Am. St. Rep. 923, and note. Where parties jointly engage in an unlawful act, they are jointly and severally liable for injury to a third person resulting therefrom, if caused by any of the parties to the unlawful act: *Murphy v. Wilson*, 44 Mo. 313; 100 Am. Dec. 290.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**KENDALL v. McCLURE COKE COMPANY.**

[182 PENNSYLVANIA STATE, 1.]

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ESTOPPEL.**—If a creditor in one state under an assignment for the benefit of creditors therein participates in a consultation of creditors with the assignee, obtains leave of court to file exceptions to the latter's account, and presents and proves his claim, he is estopped from denying the validity of the assignment as to lands in another state.

**INJUNCTION—AGAINST PROCEEDINGS IN ANOTHER STATE.**—A creditor in one state who recognizes the validity of an assignment for the benefit of creditors made by a resident of that state, by appearing before the assignee and presenting his claim, may be enjoined by the courts of that state from bringing an action in another state, and there attaching lands, on the ground that such lands did not pass by the assignment for the reason that it does not conform to the laws of the latter state.

J. G. Johnson, G. F. Baer, and G. Weidman, Jr., for the appellant.

L. W. Barringer and T. H. Capp, for the appellee.

**2** DEAN, J. The plaintiffs are assignees of Hubert H. Coleman, who, on **3** August 8, 1893, made a general assignment for the benefit of creditors. An appraisement of all the assigned estate was filed in Lebanon county on December 27, 1893; it amounted to nearly three millions of dollars, and embraced all the property of assignor in Pennsylvania, also considerable real estate and personal property in Savannah, Georgia, and Jacksonville, Florida. The defendant, the McClure Coke Company, is a Pennsylvania corporation, and, at the date of the assignment, was a creditor of the assignor in the sum of one hundred and



twenty-four thousand nine hundred and four dollars and seventy-three cents. Its agent attended meetings of the creditors held after the assignment to advise with the assignee as to the management and conversion of the assets into cash for the benefit of the creditors. To the first account filed by the assignees the defendant filed exceptions, whereupon the court appointed an auditor to hear the exceptions and make distribution to and among the creditors. The defendant appeared before the auditor, proved its claim, and was heard on the exceptions to several items of the assignees' account. It was also heard by the court of common pleas of Lebanon county on other matters touching the assigned estate. Defendant, then, while proceedings for distribution were still pending in Lebanon county, commenced suit by attachment in the courts of Georgia and Florida, and sought to appropriate, in payment of its debt, land lying in those states, and embraced in the deed of assignment. The assignees then filed this bill to restrain defendant from further proceedings in those courts, on the ground that by becoming a party creditor to the assignment in Pennsylvania and accepting benefits thereunder, it was estopped from instituting proceedings ignoring the assignment in other jurisdictions. The court below awarded a preliminary injunction, which it afterward, on hearing, dissolved. From that decree we have this appeal by plaintiffs.

The court below was of opinion that the deed of assignment passed title to the assignee to all the personal property of the assignor, without reference to its location, because it is well settled that such property passes by the law of the domicile of the owner. It is well to note here that although defendant had seized personal property on its attachment in Florida, afterward it formally released it, so that question is not a subject of contention.

But, as to the attachments levied on lands in those two states, <sup>4</sup> the defendant contended the assignment, although recorded there, was not executed and recorded in conformity with the laws of those states, and, therefore, passed no title to the assignee, thereby leaving the real estate subject to seizure by any creditor of the assignor. The court below, while not undertaking to determine the validity of the assignment and record in Florida and Georgia, nevertheless held that was a question to be determined by the *lex rei sitae*, and, although the assignment was good in the state of its execution, it declined to determine

whether it was an effective conveyance under the laws of those states, believing that was a question properly determinable by the courts of those states.

We are of opinion that, under the admitted facts, the rule of comity which prompted the decree was carried too far, and farther than the authorities warrant. For our present purpose it may be admitted that the deed of assignment was not executed and recorded in Florida and Georgia with the formalities required by the statutes of those states to make it effective there; but that is not the question here; the assignor is a citizen of this state, and the creditor is a Pennsylvania corporation. The creditor goes out of this state to a foreign jurisdiction to seek an advantage over other creditors by invalidating an assignment of property, not because it is not good here, but because it is not good there. If it succeed, it withdraws that much property from the grasp of the trustee for all the creditors. Further, the same creditor has presented and proved its claim, under the assignment here, embracing the very property it seeks to appropriate in the foreign jurisdiction; has been heard on every question it chose to raise in the court of the domicile. If it had not sought the jurisdiction of our courts to enforce its demand, and had not made itself a party creditor to the assignment, it is doubtful, on the authorities, whether comity would have suggested a relinquishment by our courts of jurisdiction; for the subject matter of the litigation, the assignment, and the persons of the litigants, are within our jurisdiction. We do not, however, decide this point, because it is not necessary to a decision of the cause. But clearly, whether a Pennsylvania creditor, under a Pennsylvania assignment, has, by positive, unequivocal acts here, estopped itself from denying the validity of the assignment, is not a question which comity demands should be referred <sup>5</sup> to the court of another state for adjudication. What significance had the acts of defendants here? The assignment was of record; it purported to convey, and did convey, under the Pennsylvania statute, to the trustee for all the creditors, the very property now attached; the defendant had both constructive and actual notice of this; it takes part in the consultation of creditors with the assignee; gets leave from court to file exceptions to the account nunc pro tunc; presents and proves its claim. Every act was a distinct affirmation that the title to all the assigned property had vested in the trustee. "Where a creditor does an act affirming the assignment, his election is made, and he is estopped from afterward impeaching it":

Burke's Estate, 1 Pars. Cas. 470. In *Guiterman v. Landis*, 1 Week. Not. Cas. 622, the court below ruled that, by participating in creditors' meetings after an assignment, and by advising with the assignee, the creditor estopped himself from questioning its regularity; and this decision was affirmed by this court. In *Groves v. Rice*, 148 N. Y. 227, the court says: "By such conduct, I think the plaintiff estopped himself from thereafter setting up the invalidity of the assignment. Having recognized it for the purpose of gaining some advantage, he could not in conscience turn around and assert its invalidity."

We think it clear that, if defendant were attempting to question the validity of the assignment under the laws of this state, it would be held to have estopped itself from denying it, by its unequivocal acts affirming it. Why, if the same acts estopped the creditor here, should he not be estopped from denying it elsewhere? If equity would close its mouth here, his mere removal to another jurisdiction does not open it to effect the same result; it is just as unconscionable to assert in Georgia the invalidity of the assignment as to assert it in Pennsylvania.

But, it is argued by appellee, if the assignment in Pennsylvania cannot pass lands in other states, where the conveyance does not conform to the laws of the situs, then, by the assignment, the property is not subject to the claims of the general creditors, and the defendant, in levying his attachment upon it, impairs no right of any creditor under the assignment; and, further, to restrain the attaching creditor is to, in effect, decide a question of foreign law, which the weight of authority holds should be decided by the foreign courts.

<sup>6</sup> As before noticed, without inquiry as to whether under the laws of Florida and Georgia the title to the lands in those states passed to the assignee, for the purposes of this case, we assume it did not; but this creditor, by the most significant acts and assertions of record, averred it did pass, and then took all the benefit possible from affirming the validity of the assignment; whether it passed or not it cannot now say it did not. What acts on the part of a corporation creditor of this state, under an assignment here, shall, in equity, constitute an estoppel, is a question for the courts of this state; for the creditor voluntarily made itself a party to the assignment; voluntarily adopted the assignee as its trustee in the management and conversion of the very assigned property it now seeks to appropriate.

The decree of the court below is reversed, and it is directed



that an injunction issue against defendant, restraining it from further prosecuting its said attachments and suits in the courts at Savannah, Georgia, and in the courts at Jacksonville, Florida, and from doing any act or thing to hinder, delay, or interfere with the said assignees in the control and management of the estate and effects hereinbefore described, or from in any way seeking to procure or secure to itself any greater benefit or interest out of said estate and effects than shall represent its pro rata share of the distribution of the estate and effects of Robert H. Coleman under the said assignment to and among the creditors entitled thereto.

It is further ordered that appellee pay the costs.

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**INJUNCTION AGAINST PROSECUTION OF ACTION IN ANOTHER STATE.**—A court of equity in one state has power to restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens: *Hawkins v. Ireland*, 64 Minn. 339; 58 Am. St. Rep. 534, and note; *Miller v. Gittings*, 85 Md. 601; 60 Am. St. Rep. 352. In some instances, an assignment in insolvency, or for the benefit of creditors is not operative beyond the state in which it is made, and in those cases it has been held that a creditor of the insolvent may, notwithstanding his voluntary assignment or compulsory proceedings against him, sue him in another state and subject his property found therein to attachment or execution. But the better opinion is, that, as to residents within the state where the assignment is made and where it, though voluntary, is operative, neither of them will be permitted, by proceedings in another state, to obtain an advantage over the other creditors: Monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 880, 881.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—ESTOPPEL OF CREDITOR TO CONTEST.**—An assignment made to delay creditors cannot be questioned by one who took a dividend under it: *Adlum v. Yard*, 1 Rawle, 163; 18 Am. Dec. 608, and extended note. Likewise a creditor cannot claim under an assignment for the benefit of creditors after resisting the assignment by setting up a claim antagonistic to it: *Ewing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765. See *Bynum v. Miller*, 86 N. C. 559; 41 Am. Rep. 467.

## PALMORE v. MORRIS, TASKER AND COMPANY.

[182 PENNSYLVANIA STATE, 82.]

NEGLIGENCE—DEFECTS IN BUILDINGS—CHANGE OF OWNERSHIP.—A grantee who acquired title and took possession of real estate, on which was an obviously defective structure, on the day before an accident resulted from neglect to repair such structure, is liable therefor. In such case the grantor is not liable.

NEGLIGENCE—DEFECTS IN BUILDINGS—CHANGE OF OWNERSHIP—DUTY TO REPAIR.—It is presumed that a grantee, before purchasing real estate, examined it and was cognizant of its situation and surroundings, and the character of the structures upon it, and their obvious condition of repair, and without an express covenant by the grantor there is no duty on his part to repair. The purchaser assumes that duty upon taking possession, and is thereafter liable for all injury resulting from neglect to make necessary repairs.

G. W. Hart and F. H. Bohlen, for the appellant.

A. D. Hannington, for the appellee.

<sup>85</sup> DEAN, J. On May 11, 1895, the plaintiff, a boy about ten years old, was standing on the pavement on the north side of Morris street, Philadelphia, looking through a partially opened gate into the large foundry works, before that time carried on at that place by Morris, Tasker & Co., defendants. While so standing the gate fell and seriously injured him. On that day, the works no longer belonged to Morris, Tasker & Co. <sup>86</sup> The accident occurred on Saturday; on Friday, the day previous, they had conveyed the property by deed to George Lodge, and the deed had been put on record the same day. When defendants delivered the deed, they also gave to Lodge a letter, of which this is a copy:

“Mr. George Lodge.

“Philadelphia, May 10th, 1895.

“Dear Sir: We write to state that we can allow you to take possession 5-13-95 of all the buildings on the square of ground for which settlement has been made to-day, with the exception of the storehouse on the corner of Fifth and Tasker streets, you to allow us two weeks to vacate and remove the material therein belonging to us. The power plant, consisting of boilers, engines, and so forth, which belong to us, we will remove after you notify us that the parties who lease the same are through and that the contents are ready for us to haul away. Please notify us when we can remove all material belonging to us, that is, power plant now leased by the Southern Electric Company. There are

two planers, one punch, a part of tramway belonging to Mr. Smith, and he asks that we have until Wednesday, May 15th, to haul away.

Yours very respectfully,

“MORRIS, TASKER & CO.”

It will be noticed that while in the heading the letter is dated May 10th, in the body of it the date is May 13th, which was the following Monday. But Lodge acted on the assumption that his possession commenced on the 10th, and his brother and Cronin, an employé, went upon the premises and took formal possession, so announced to those in the building, and gave orders, stopping a man named Smith from removing scrap-iron and machinery, which he had purchased from defendants before the conveyance to Lodge, and which Lodge did not allege had passed to him by the deed. The man hauling away the machinery, then, the same day, May 10th, called on Morris, Tasker & Co., and obtained from them a letter to Johnson, their head workman at the foundry, of which this is a copy:

“May 10th, 1895.

“Mr. William C. Johnson, Paschall Iron Works, Philadelphia.

87 “Dear Sir: This is to notify you that Mr. Lodge is not to interfere in any way with the hauling of the scrap-iron from the works until Monday; also that Mr. Smith is to have until Wednesday to haul out his machinery, all as per letter of acceptance by Mr. Lodge to-day.

Very respectfully yours,

“MORRIS, TASKER & CO.”

On being shown this letter, Cronin, who had acted for Lodge, permitted the purchasers of the personal property to go on removing it, but excluded them from any occupation of the premises not necessary to the removal. Cronin and another watchman of Lodge maintained for him formal possession all Friday afternoon and night, and Saturday morning until 8 o'clock, when the gate fell. Lodge himself testifies that when the settlement had been made between him and defendants on Friday, in pursuance of which the deed was delivered to him, he telephoned to his brother, and the brother and Cronin took possession. He says that afterward, on the evening of the same day, he told them he had not the right of possession until Monday, but the uncontradicted evidence is, that Cronin and another employé of Lodge remained on the premises until after the accident.



The plaintiff, treating Morris, Tasker & Co. as in possession, brought suit against them for damages, averring that his injury was the result of their negligence in maintaining a dangerous and badly secured gate on a building adjoining a public sidewalk. There was evidence sufficient to warrant the jury in finding the gate was out of repair, and that there was negligence on part of him whose duty it was to repair; but the question on which the case must turn is, Were defendants answerable for this neglect, after delivery of the deed, and possession under it taken by Lodge?

At the trial, among many written points, defendants' counsel asked the court to instruct the jury as follows: "2. If Morris, Tasker & Co's title had been divested and possession surrendered before the accident, the plaintiff cannot recover against them. Answer: I decline that point."

The view the learned judge of the court below took of the law applicable to the facts is best shown by the following excerpt from the general charge:

88 "The question, however, is not one of the exact time of the transfer, nor one of the delivery of possession. The real question is as to whether or not there was a failure of duty upon the part of the defendants, and whether that failure of duty was the cause of this accident. No doubt, as soon as Mr. Lodge took possession of this property, then a duty would begin with him. He ought within a reasonable time to see that the property which he had purchased, if it was in a dangerous condition to the public, was put in repair, but with that question we have nothing to do in this case. The real question in the case is not as to when there was a transfer of the title, but was there any act of commission or of omission upon the part of the defendants which amounted to that want of reasonable care which the law makes negligence, and whether you find that to be the fact."

Under fuller instructions in accord with this view, the jury found for plaintiff, and we have this appeal by defendants, assigning for error, among others, the refusal of the court to affirm their second point.

It is clear from plaintiff's own testimony that the title and constructive possession of the real estate vested in Lodge, absolutely, on the 10th of May, the day before the accident. It is also clear that in pursuance of the grant by deed he attempted to take formal possession within an hour after delivery; and while the oral stipulation between him and the grantors was that

actual possession was not to be taken until the following Monday, nevertheless, there is evidence that he took possession on Friday, and did not restore it to defendants, who assented to his action, stipulating only for the right of entry and exit for removal of the property which did not pass by the deed. Under the facts, then, unquestionably Lodge acquired title, and in fact took possession of the real estate, on which was a defective structure, the day before an accident resulted from neglect to repair it.

The authorities on the exact question are very meager. As between a landlord and a tenant at will, or for a term, the weight of authority is, that the landlord continues answerable, though out of possession, for injuries resulting to third parties from negligently constructed buildings and structures on the land where they were erected by the landlord. The very letting by him of to him known defective property, without stipulation <sup>89</sup> for repair, is significant of continuous negligence on his part: *Godley v. Hagerty*, 20 Pa. St. 387; 59 Am. Dec. 731, and the cases following it down to *McKenna v. Nixon Paper Co.*, 176 Pa. St. 306. But this is not a letting of the land by a landlord to a tenant; it is an absolute sale, whereby the owner divests himself of title and all right to possession, or of re-entry for repairs, or for any other purpose; any future possession in the face of his deed, unless there be an independent stipulation to the contrary, would be a palpable trespass; and with his surrender of possession, all the duties incident to ownership, as to him, were at an end; from the moment Lodge took possession under his deed, the duties theretofore incumbent on Morris, Tasker & Co. were transferred to him, and he became answerable to the public for neglect in their performance.

The learned judge of the court below adopts a different event for the commencement of liability on the part of the grantee than possession taken under the deed; he says "he ought, within a reasonable time, to see that the property which he had purchased, if it was in dangerous condition to the public, was put in repair." That is, he imports into the deed an implied covenant on part of the grantors that they will be answerable to third parties for defects in the building for a reasonable time after the grantee takes possession. Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction; nor does the law warrant such an implication. Before he purchased the real estate the law presumes the grantee

examined the property, and was cognizant of its situation, surroundings, the character of the structures upon it, and their condition of repair. Without an express covenant by the grantors, as between them and the grantee, there was no duty on the grantors to repair; the purchaser, thereafter, assumed that duty, because he then became the owner and occupant. If the grantors, after possession by Lodge, the grantee, owed no duty to him, why should there be neglect in performance on their part as to the public? It is not even the case of no actual occupancy, where the law casts the duty on the owner, but one where the owner and actual occupant were the same.

If the accident did not happen during the ownership and occupancy of Morris, Tasker & Co., and the evidence showed <sup>90</sup> that it happened after Lodge took possession, the question for the jury was not whether there was negligence on part of defendants in maintaining a defective gate; the real question on the evidence was, Did Lodge take possession of the property described in his deed on Friday the 10th of May? If he did, then the accident which occurred on the 11th must be imputed to the negligence of the owner and occupant of the premises, and not to Morris, Tasker & Co., who before that time were owners and occupants. And this is the principle announced in *Grier v. Sampson*, 27 Pa. St. 183, *Cheetham v. Hampson*, 4 Term. Rep. 318, and *Blunt v. Aikin*, 15 Wend. 522, 30 Am. Dec. 72, although the facts in all these cases are different from those before us. And while laying down this rule in this case, we do not intend to be understood as declaring there can be no exception to it. There may be a case where the grantor conceals from the grantee a defect in a structure known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession; but that is not this case; the rotten gate, the testimony shows, was as obvious before the accident as afterward, and the reasonable time for the purchaser to discover it was not limited to the twenty hours after he took possession, but to the weeks and months pending the negotiations, before the delivery of the deed.

On the undisputed evidence the jury should have been instructed to find for defendants.

The judgment is reversed.

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**REAL PROPERTY—DANGEROUS STRUCTURES—LIABILITY OF OWNER.**—It is an owner's duty to see that his building is in a safe condition, and he is liable for all damages which may result from his neglect of such duty: *Steppe v. Alter*, 48 La. Ann. 363; 55



Am. St. Rep. 281, and note. See *Lowe v. Salt Lake City*, 13 Utah, 91; 57 Am. St. Rep. 708, and note. If a dilapidated house by the roadside actually falls upon a passer-by and injures him, the owner or occupier of the house is answerable for the damage occasioned thereby: Monographic note to *Zoebisch v. Tarbell*, 87 Am. Dec. 662. While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care enables him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it: *Ryder v. Kinsey*, 62 Minn. 85; 54 Am. St. Rep. 623, and note.

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## HIMMELREICH v. SHAFFER.

[182 PENNSYLVANIA STATE, 201.]

**PARTNERSHIP—INDIVIDUAL AND PARTNERSHIP CREDITORS—PREFERENCES.**—A partnership creditor can work out his equity only through the equities of the partners. If there is no partnership as a matter of fact, there is nothing upon which a partnership creditor can found a claim for preference over individual creditors.

**PARTNERSHIP—INDIVIDUAL AND PARTNERSHIP EXECUTION CREDITORS—PREFERENCES.**—If two persons hold themselves out as partners when no partnership exists between them, an individual creditor of one of them, who levies execution upon his property, thereby gains a preference over a partnership creditor whose execution is later in date and who alleges that the execution already levied is upon partnership property.

A. A. Leiser and McCauley, Ames & Whitmore, and J. M. and P. B. Linn, for the appellants.

H. A. Hall, for the appellee.

202 GREEN, J. This is a contest between the individual execution creditors of T. J. Shaffer and the appellants, as partnership creditors of Jacob Shaffer & Son over a fund produced by a sale upon execution of certain timber seized upon several executions. There were four writs of fieri facias issued against T. J. Shaffer individually, and one, that of the appellants, issued against the firm of Jacob Shaffer & Son. The writs in the individual cases had priority, being issued one day prior to the writ in favor of the appellants. The timber was undoubtedly cut under a written contract which purported to be made between the appellants and the firm of Jacob Shaffer & Son, and it is beyond all question that, as between the parties to the contract, both Jacob Shaffer and T. J. Shaffer would be estopped from denying their partnership. But here there are individual creditors of T. J. Shaffer who have a lien on the same property by virtue of

their executions, and thus a contest arises as to which set of creditors is entitled to the proceeds. The auditor found that in point of fact there never was a partnership between Jacob Shaffer and T. J. Shaffer, and therefore awarded the fund to the individual creditors. Upon exceptions filed the report of the auditor was confirmed, and, thereupon, the present appeal was taken by the partnership creditors. An examination of the testimony is very convincing that the finding of the auditor was correct. T. J. Shaffer was examined as a witness and testified that his father never was his partner, and that in all the rest of his dealings, except those with Himmelreich & Co., he never held himself out as having <sup>203</sup> a partner, and that all his other operations were conducted by himself alone. He was asked, "Did you not put your father's name in the Himmelreich contract simply to give them your father as additional security for the fulfillment of the contract? A. Yes, sir. Q. As a matter of fact there was no copartnership between your father and yourself? A. No more than his name is on that agreement. There was no partnership between ourselves. My father's name is signed to the agreement with Himmelreich, and I signed it, but he put nothing in and got nothing out."

As has been already said, there is no kind of doubt that, as between Jacob Shaffer & Son and Himmelreich & Co., there was a partnership which could not be denied by Shaffer & Son. But the determination of that question does not settle the present contention. Here the rights of the individual creditors of T. J. Shaffer are concerned. Their executions were prior in date of levy, and if they can lawfully set up their individual rights as against the partnership rights of the appellants, they are perfectly at liberty to do so, and under the thoroughly well-settled law of the commonwealth they must prevail. Of course, they are not subject to any disqualification to establish by proof the actual state of the facts. They have done so in this case. The facts are found in their favor, and no matter what the hardship is to the appellants, they must prevail if the law so declares. The subject has been before this court in a number of well-considered cases, notably *Doner v. Stauffer*, 1 Penr. & W. 198, 21 Am. Dec. 370, *Baker's Appeal*, 21 Pa. St. 76, 59 Am. Dec. 752, *York County Bank's Appeal*, 32 Pa. St. 446, and *Scull's Appeal*, 115 Pa. St. 141. It is not necessary to review them in detail. The leading principle prevails in them all. Perhaps the best annunciation of the doctrine, in circumstances most apposite to those of the

present case, was made in York County Bank's Appeal, 32 Pa. St. 446. There an actual agreement of partnership had been executed, and business was carried on under it for several months, but because one of the partners had not complied with his agreement in paying into the firm the moneys he had agreed to pay, the agreement was held to be nugatory as to the individual creditors of the other partners who had a prior levy, and the fund was awarded to the individual creditor to the exclusion of the partnership creditors. The entire stock of alleged partnership effects was sold and the proceeds brought <sup>204</sup> into court for distribution. Said Thompson, J., delivering the opinion: "The appellant claims to have his execution, although subsequent in time, first satisfied out of the proceeds of sale, on the ground that his was a partnership debt, and the property sold was partnership property. The appellee claims priority of satisfaction on the ground that as between the partners there was no joint property; that it all belonged to Keys, and that, as his separate creditor, he is entitled to be paid out of it his individual debt in its order of priority. . . . When a creditor levies on the property of a firm, his execution fixes and attaches to this right to the same extent that it existed in the partners, and hence the preference over a separate execution creditor in the distribution. All this is predicable of a case of joint property only. But where there was no joint property the rule has nothing to operate on. The mere name is not enough in such case—there must be an equity. If that equity never existed, a creditor's execution could not attach to any right, amounting to a lien, to have the assets appropriated to a partnership debt. That Moore has no interest in the firm property is found by the auditor. . . . This being so, the property levied on was individual property in fact, although seized in the firm's name. The appellant cannot work out his equity through the partners, for they, as such, did not exist, *inter se*, and the individual owner could not give him this right over a prior execution against him individually. The property was all individual property, and priority of seizure gave priority of right in the distribution."

It is true, as contended for the appellants, that in their contract for the timber the name of Jacob Shaffer & Son appears as the other contracting party, and it was testified for the appellants that checks were given by the appellants on account for the timber sold, in the name of Jacob Shaffer & Son, but it is also true under the testimony that Jacob Shaffer had put no money or



other property in the firm, and was entitled to nothing out of it, and it was testified also, and the auditor has so found, that there never was a partnership, nor an agreement for a partnership, between the father and son. Between the appellants and the Shaffers there was undoubtedly a partnership, but not as between the appellants and the appellees who are individual creditors of T. J. Shaffer, and have their own rights <sup>205</sup> of which they cannot be deprived by the mere circumstance that others have rights as between themselves and the alleged partners, but which cannot be set up against the appellees.

In Scull's Appeal, 115 Pa. St. 141, also, there was a nominal partnership, and it was general in all the business in question. There was a public notice of the partnership by advertisement in the papers, and the alleged partners were to have an interest in the profits, and they participated in the business, giving checks and signing receipts in the firm name. But the auditor found that there was no actual partnership, and therefore gave preference to the individual over the partnership creditors. The present chief justice, in delivering the opinion, referred the case to the ruling in York County Bank's Appeal, 32 Pa. St. 446, and based the decision upon the same principle, to wit, that the partnership creditor could only work out his equity through the equity of the partners, and, if there was no partnership as a matter of fact, there was nothing upon which the partnership creditor could found a claim for preference. We also applied the same doctrine in Bixler v. Kresge, 169 Pa. St. 405; 47 Am. St. Rep. 920. In that case, also, the contest was between partnership and individual creditors of an alleged firm. The business of the firm was carried on in the name of the firm, notice to that effect was publicly given out, their goods were bought in the name of the firm, the store books were kept in the same name, as was also the bank account, and checks were drawn in the firm name. But the auditor held for sufficient reasons that in point of fact there was no actual partnership, and on that ground held that the partnership creditors could not succeed with their claims. The court below affirmed the auditor's report, and we sustained the decree. It would be a work of supererogation to discuss the subject at length. It is only necessary to know whether the facts of a given case are brought within the controlling principle. They are so found in this case upon sufficient testimony; that finding is sustained by the learned court below, and we see no

reason for reversing that action. The assignments of error are not sustained.

Decree affirmed and appeal dismissed at the cost of the appellants.

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**PARTNERSHIP—INDIVIDUAL AND FIRM CREDITORS—PRIORITIES.**—Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership through the equities of such members: *Thayer v. Humphrey*, 91 Wis. 276; 51 Am. St. Rep. 887, and note. Creditors of individual partners cannot acquire any greater interest in partnership effects than the partner himself is entitled to: *Goldthwaite v. Janney*, 102 Ala. 431; 48 Am. St. Rep. 56. As between the partnership creditors and the individual creditors of an alleged partner of an alleged partnership having no actual existence in fact, although the parties thereto have held themselves out to the world as partners, there is no equity to support the claim of execution partnership creditors as against prior execution creditors of the individual partner who is the owner of the assets: *Bixler v. Kresge*, 169 Pa. St. 405; 47 Am. St. Rep. 920. See monographic note to *Smith v. Smith*, 43 Am. St. Rep. 370-372.

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## O'NEIL v. BEHANNA.

[182 PENNSYLVANIA STATE, 236.]

**STRIKES—INTIMIDATION, WHAT IS—INJUNCTION.**—A display of force by strikers against laborers desiring to work, such as surrounding them, calling them opprobrious names, and in a hostile and vicious manner urging them not to go to work, is intimidation, though no force is actually used, and as such is as unlawful as violence itself. Such acts may be restrained by injunction and the actors held liable to the employer for all damages resulting from their acts.

**STRIKES—RIGHT OF STRIKERS TO INTERFERE WITH LABORERS.**—The time of men employed to take the place of strikers, when on their way to work, cannot be lawfully taken up and their progress interfered with by strikers under pretense or claim of right to argue with or persuade them to break their contracts.

**STRIKES—INTIMIDATION—LIABILITY IN DAMAGES.**—Strikers who induce newly employed men to break their contracts by meeting and following them in large numbers and calling them opprobrious names, sometimes surrounding them and endeavoring to pull them away, are liable to the employer for all damages suffered by him in consequence.

**STRIKES—LIABILITY OF STRIKERS FOR DAMAGES.**—All who take part personally in the unlawful conduct of strikers, or act in such combination as makes them liable for the acts of the others, done in pursuance of the common purpose, are answerable for all damages resulting to the employer therefrom.

**STRIKES—END OF STRIKE—LIABILITY OF STRIKERS THEREAFTER.**—An action against strikers to recover damages resulting from their unlawful acts may be proceeded with and a recovery had after the strike has ended.

Bill in equity for an injunction against strikers, and to recover damages caused by their unlawful acts. The court below sustained exceptions to the master's report, imposed part of the costs on the defendants, and allowed no damages for the plaintiff, who appealed.

E. Campbell and R. P. Kennedy, for the appellant.

A. D. Boyd and Howell & Reppert, for the appellees.

**243** MITCHELL, J. We are obliged to differ wholly from the view of the facts reported by the learned master. It is totally irreconcilable with the testimony read in the light of experience and a knowledge of human nature. Nor can we agree entirely with the view of the court below, though it is more in accordance with the evidence and the law. The learned judge in his opinion says: "The testimony establishes the fact that certain of the defendants overstepped these bounds and used annoyance, intimidation, ridicule, and coercion to prevent new men from engaging in work for the plaintiff. When the new men were followed and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, and followed to their lodging places, all the time being pressed and entreated to return, and called 'scabs' and 'blacklegs,' and sometimes surrounded, and the effort made to pull them away, an unfriendly (at least) atmosphere about everywhere, it must be admitted that there was something more than mere argument and persuasion, and the orderly and legitimate conduct of a strike. This was certainly serious annoyance and well calculated to intimidate and coerce. And that effect was apparently produced on more than one occasion. Nor did such acts entirely end when the men imported actually began work, but such men were, on occasions and in a less public manner, approached in a like manner in their intervals of labor, and advised that there would be trouble there, and they had better leave. No actual violence, however, was employed."

This is a mild and judicially restrained statement of what the evidence clearly showed. The strikers and their counsel seem to think that the former could do anything to attain their ends, short of actual physical violence. This is a most serious misconception. The "arguments," and "persuasion" and "appeals" of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. **244** The



display of force, though none is actually used, is intimidation, and as much unlawful as violence itself.

An attempt is made to argue that the strikers only congregated at the place of arrival of the new men in accordance with the custom at boat and train arrivals in small towns. But this disguise is too flimsy to hide the real purpose. If they desired in good faith to meet peaceably and lawfully for their own business, they should have selected another place sufficiently remote to be free from the excitement and crowds which their own testimony admits attended the arrival of the new men, and also far enough away to avoid the intimidating effect of a hostile crowd on the newcomers. But in truth they did not desire to avoid that effect. On the contrary, that was what they were there for, and their presence indicates their real intentions too plainly for any verbal denials on their part to offset.

It is further urged that the strikers, through their committees, only exercised ("insisted on" is the phrase their counsel use in this court) their right to talk to the new men, to persuade them not to go to work. There was no such right. These men were there presumably under contract with the plaintiff, and certainly in search of work if not yet actually under pay. They were not at leisure, and their time, whether their own or their employer's, could not lawfully be taken up and their progress interfered with by these or any other outsiders on any pretense or under any claim of right, to argue or persuade them to break their contracts. Even, therefore, if the arguments and persuasion had been confined to lawful means, they were exerted at an improper time, and were an interference with the plaintiff's rights which made the perpetrators liable for any damages the plaintiff suffered in consequence. But in fact their efforts were not confined to lawful means. The result of the evidence, as stated by the learned judge, is that the new men were "followed and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, . . . called 'scabs' and 'blacklegs,' and sometimes surrounded and the effort made to pull them away." This view is quite sufficiently favorable to the defendants; and, as already said, a hostile and threatening crowd does not need to resort to actual violence to be guilty of unlawful intimidation. The acts of these defendants were an unlawful interference <sup>245</sup> with the rights of the new men, and with those of the plaintiff. In *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686, it is said by our

brother Dean, that "it is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and under the constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept," nor, as the same right may be stated with reference to this case, to prevent his working for such pay as he can get and is willing to accept. We regard the testimony as demonstrating that the defendants were guilty of an unlawful combination, which, while professing the intention and trying to maintain an outward appearance of lawfulness, was carried out by violent and threatening conduct, which was equally a violation of the rights of the new men who came to work for plaintiff and of the plaintiff herself, and that they are liable in this suit for all the damages which plaintiff suffered thereby.

We have nothing at present to do with the acts of assembly from 1869 to 1891 which have modified the common law as to conspiracy. The question of their constitutionality was left open in *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686, and does not need to be considered here, as the evidence takes the case entirely out of their provisions.

The learned judge below found no damages against any of the defendants, but made a distinction between them as to liability for costs. We do not think the evidence sustains this distinction. The master reports that "all of the defendants are included in the term 'strikers,' as used by him in his report," and the testimony is ample to show that all participated personally in the unlawful conduct, or in such combination as made them liable for the acts of the others done in pursuance of the common purpose.

The view taken by the master prevented him from considering the subject of damages, nor did the learned judge make any specific findings on them. In the absence of such findings, we do not enter on the discussion of the subject further than to say that the plaintiff has established her claim to some substantial damages, though her claim may be larger and may start at an earlier date than the proof will sustain. So far as yet appears, the defendants did nothing to make them liable prior to the attempt of plaintiff to resume operations in February, 1893. <sup>246</sup> But after that date the violation of her rights is clear. The case must go back for examination and ascertainment of the facts on this branch of it.

Not the least notable feature is the expression of surprise by the counsel and even by the court that the case was pushed

after the strike was over. It appears to be a fact that the strike was less violent and disorderly than others which had preceded it, and a sentiment seems to have pervaded the community, even the court not being entirely exempt, that the strike being over, the subject had better be dropped. This is not law nor justice. A plaintiff who might have been hurt worse than he was may be inclined not to push his claim for compensation for the injury actually received, but it is for him, and not for others, and especially not for courts, to make the choice, and there should be no judicial surprise if he insists on his rights, though other men may think discretion the better part of valor.

Decree reversed, bill reinstated and damages directed to be ascertained in accordance with this opinion. Costs to be paid by the appellees.

**Strikes and Strikers—Unlawful Interference or Intimidation—What Is.**

"A strike is a combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like": Delaware etc. R. R. Co. v. Bowns, 58 N. Y. 573-582. A strike has otherwise been defined to be a "concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of employment, are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employé to the service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions": Arthur v. Oakes, 63 Fed. Rep. 310-326. Mr. Justice Jenkins, in Farmers' Loan etc. Co. v. Northern Pac. R. R. Co., 60 Fed. Rep. 803-820, severely criticised this definition of a strike, and said: "If the latter be a correct definition of a strike, society has been needlessly alarmed. I doubt if, in the light of the history of strikes, the child would be recognized by its baptismal name. To my thinking, a much more exact definition of a strike is this: 'A combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end. The intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence when requisite to the accomplishment of the end, being the other and more effective means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is an impeachment of intelligence. From first to last, from the earliest



recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connelville, Pennsylvania, occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can only come through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a lawful strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end, being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places; and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master, and so, by intimidation and by the compulsion of force to accomplish the end designed. I know of no peaceable strike, I think no strike was ever heard of that was or could be successful unaccompanied by intimidation and violence: Farmers' Loan etc. Co. v. Northern Pac. R. R. Co., 60 Fed. Rep. 821."

No doubt the earlier cases treated the abandonment of service by workmen by preconcerted arrangement as criminal conspiracies, regardless of the reasons for such abandonment: *People v. Fisher*, 14 Wend. 9; 28 Am. Dec. 501; *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346; *State v. Glidden*, 55 Conn. 47; 3 Am. St. Rep. 23. But of late years this doctrine has been so modified that it is now universally conceded that employés possess the right to strike or quit work in a body by preconcerted action or arrangement or agreement, provided they do not interfere with the rights of others, whether coemployés, employers, or the public generally. They have the right to seek to better their condition by shortening their hours of labor or increasing their wages by all possible means; and combinations to that end, if unaccompanied by threats, violence, disorder, or attempts to coerce, are lawful and legitimate. They may agree in a body that they will not work below certain rates, and a strike to accomplish this purpose, if unaccompanied by any of the aforementioned elements of violence, is not unlawful. Thus, in *Longshore Printing Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, it was held that strikes among workmen are not necessarily unlawful, though they may become both illegal and criminal by the means employed to enforce their objects. Employés may lawfully quit their service, either singly or in a body, but if unlawful means are used to uphold or maintain a strike, or if the end to be obtained is un-

lawful, then the strike itself is unlawful. Strikers commit no unlawful act so long as they do not resort to acts tending to destroy freedom of action, such as intimidation, threats, or violence. In *Farrer v. Close*, L. R. 4 Q. B. 602-612, Sir James Haunen said: "I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either master or men, or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages or for the purpose of compelling the fulfillment of an engagement entered into between employers and employes, or for any other lawful purpose."

In *Arthur v. Oakes*, 63 Fed. Rep. 310, it was held that, as a matter of law, "A combination among employes, having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employers, on account simply of a reduction in wages, although a strike, is not unlawful." Employes may combine and peaceably quit their employment in a body, and without intimidation persuade their fellow workmen to leave the service of their employer, in order to obtain and enforce an advance in wages: *Rogers v. Evarts*, 17 N. Y. Supp. 264.

In *Snow v. Wheeler*, 113 Mass. 179, the court said: "In the relations existing between labor and capital the attempt by co-operation, on the one side, to increase wages by diminishing competition, or, on the other, to increase the profits due to capital, is, within certain limits, lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor and capital." In *United States v. Kane*, 23 Fed. Rep. 748, it was held that if employes of a railroad in the hands of a receiver are dissatisfied with the wages paid, they may abandon the employment in a body, and by persuasion or argument induce other employes to also quit, but if they resort to threats or violence to induce the others to leave, or accomplish their purpose without actual violence by overawing the others by preconcerted demonstrations of force, and thus prevent the operation of the road, their acts are unlawful and they may be punished therefor. In *In re Higgins*, 27 Fed. Rep. 443, the court decided that the employes of the receiver of a railroad, although pro hac vice officers of the court, have a right to strike and quit their employment, provided they do not thereby intentionally injure and disable the property, but they must quit peaceably and decently, and if they thereafter willfully injure the property or endanger it, or seek to cripple its operation, their acts are unlawful, and they may be held liable therefor.

It is not the object of this note to deal with the remedy by injunction, contempt, or civil action for damages, against the unlawful acts of strikers; the only object is to show, by illustration from the adjudicated cases, when acts performed by men on strike are un-

lawful. Intimidation by strikers which prevents other workmen from taking their places is always unlawful, and to constitute such intimidation it is not necessary that there should be any overt act of violence, or any direct threat by word of mouth. It is enough if the attitude of those engaged in the overt act is intimidating, and this may be shown by the number of the strikers, their methods, their placards, their circulars, and their devices: *People v. Wilzig*, 4 N. Y. Crim. Rep. 403; *People v. Kostka*, 4 N. Y. Crim. Rep. 429; *In re Wabash R. R. Co.*, 24 Fed. Rep. 217.

Maintaining a picket or patrol by strikers is usually considered an unlawful act. Thus, maintaining a patrol of two men, changed every hour, in front of the employer's premises as part of a combination to interfere with his business until he shall adopt a certain schedule of prices, in conjunction with persuasion, social pressure, and threats of personal injury or unlawful harm conveyed to persons employed by him or seeking such employment, amounts to intimidation: *Vegehn v. Gunter*, 167 Mass. 92; 57 Am. St. Rep. 443; *Regina v. Druitt*, 10 Cox C. C. 592; *Regina v. Hibbert*, 10 Cox C. C. 82; *Regina v. Bauld*, 13 Cox C. C. 282; *People v. Kostka*, 4 N. Y. Crim. Rep. 429; *People v. Wilzig*, 4 N. Y. Crim. Rep. 403; *Lyons v. Wilkins* (1896), L. R. 1 Ch. 811. In *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895-906, it was said that "the men who walk up and down in front of a man's shop may be guilty of intimidation though they never raise a finger or utter a word. Their attitude may, nevertheless, be that of menace. They may intimidate by their numbers, their pleadings, their methods, their circulars, and their devices. It matters little what are the means adopted by combinations formed to intimidate employers, or to coerce other journeymen, if the design or the effect of them is to interfere with the rights, or to control the free action, of others. No one has a right to be hedged in and protected from competition in business, but he has a right to be free from wanton, malicious, and insolent interference, disturbance, or annoyance. Every man has a right to work for whom he pleases and for any price he can obtain; and he has a right to deal with, and associate with, whom he chooses, or to let severely alone, arbitrarily and contemptuously, if he will, anybody and everybody upon earth. But this freedom of uncontrolled and unchallenged self-will does not give the right, either by himself or in combination with others, to disturb, injure, or obstruct another, either directly or indirectly, in his lawful business or occupation, or in his peace and security of life. Every attempt by force, threat, or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression, and any and every combination for such a purpose is an unlawful conspiracy. The law will protect the victim and punish the movers of any such combination. In law, the offense is the combination for the purpose and no overt act is necessary to constitute it."

Carrying banners in front of an employer's place of business, with inscriptions calculated to injure his business, and to deter workmen from entering into or continuing in his employment, constitutes an unlawful act: *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689.



If a large body of strikers join in marching with music and banners past the property of their former employer and the homes of the men then working for him, and thus march and countermarch along the public highway, halting in front of the property and taking positions on each side of the road where the employ  s must cross in going to and from their work, the avowed object of the strikers being to influence such workmen to join the strike, such acts constitute intimidation, and make the strikers guilty of unlawful interference with rights of their former employer and his workmen: *Mackall v. Ratchford*, 82 Fed. Rep. 41. A simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employ  s in the performance of their duties, is unlawful intimidation and not less obnoxious than the use of physical force for the same purpose: *In re Doolittle*, 23 Fed. Rep. 545. Striking employ  s who attempt, by intimidation and threats of violence, to coerce employ  s to leave their work and join a strike, or who refuse to permit other persons to work for the employer, and endeavor to accomplish this purpose by threats, coercion, menaces, and opprobrious epithets addressed to such workmen, or who seek to accomplish their purpose by gathering in crowds at the employer's place of business and at the boardinghouses of his workmen or by following the employ  s to and from their work, stopping them upon the highway, and holding them up to ridicule to the contempt of bystanders, are guilty of intimidation and unlawful interference, and either of such acts may be restrained by injunction: *Wick China Co. v. Brown*, 164 Pa. St. 449; *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678; *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212; 52 Am. St. Rep. 622; *Coeur D'Alene etc. Min. Co. v. Miner's Union*, 51 Fed. Rep. 260. Thus strikers who unlawfully interfere with the management of the business of a corporation to compel the adoption of a particular scale of prices by congregating riotously and in large numbers at and near the works of the corporation for the purpose of preventing persons not members of a certain organization from entering the employ of the corporation or remaining therein, by intimidation, consisting in physical force, or injury actual or threatened, to persons or property, may be enjoined from committing such acts: *Consolidated Steel etc. Co. v. Murray*, 80 Fed. Rep. 811; *Davis v. Zimmerman*, 91 Hun, 489. Any combination of strikers for the purpose of compelling employ  s to conform to any rule, regulation, or agreement fixing the rate of wages, by the imposition of a penalty, or by agreeing to quit the service of any employer who employs journeymen below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, intimidation, violence, or other unlawful means, is a conspiracy which may be punished as unlawful: *Master Stevedores v. Walsh*, 2 Daly, 1.

The act of strikers in procuring workmen who are employed upon terms as to wages which are just and satisfactory to them to quit work in a body, for the purpose of compelling the employer to accede to the demands of the strikers, is a malicious and illegal interference with the employer's business, which is actionable: *Old Dominion S.*

**S. Co. v. McKenna**, 30 Fed. Rep. 48. And any act of strikers who combine to intimidate an employer, and to compel him against his will to discharge his workmen, and employ others named by the combination, is illegal and actionable: **State v. Glidden**, 55 Conn. 46; 3 Am. St. Rep. 23; **State v. Donaldson**, 32 N. J. L. 151; 90 Am. Dec. 649; **State v. Stewart**, 59 Vt. 273; 59 Am. Rep. 710. Any combination on the part of striking employes is illegal which has for its object to cripple railroad property in the hands of a receiver and to embarrass the operation of the road under his management, either by disabling or rendering unfit for use the rolling stock of the road, or by interfering with its possession or by actually obstructing the control or management of the property, or by using force, threats, intimidation, or other wrongful methods against the receiver, or against employes remaining in the service, or by using like methods to cause such employes to quit, or prevent or deter others from entering the service in the place of those leaving it: **Arthur v. Oakes**, 63 Fed. Rep. 310; **In re Doolittle**, 23 Fed. Rep. 545; **In re Debs**, 158 U. S. 564; **United States v. Elliott**, 64 Fed. Rep. 27; **Lake Erie etc. Ry. Co. v. Bailey**, 61 Fed. Rep. 494. A combination among employes to quit the service in a body, with the design and intent of crippling railroad property in the hands of a receiver, or embarrassing the operation of the road, is unlawful and may be enjoined: **Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.**, 60 Fed. Rep. 803; **Toledo etc. Ry. Co. v. Pennsylvania Co.**, 54 Fed. Rep. 746.

A combination by strikers to incite the employes of a railroad in the hands of a receiver, or of any other or all other roads in the country to suddenly quit the service, without any dissatisfaction with the terms of their employment, thus utterly paralyzing all railway traffic, in order to force the railroad company or companies and the public into compelling an owner of cars used in operating the road to pay his employes more wages, when they have no legal right so to compel him, is an unlawful combination by reason of its purpose, whether such purpose is effected by means, usually lawful or otherwise: **Thomas v. Cincinnati etc. Ry. Co.**, 62 Fed. Rep. 803. If a large body of journeyman tailors employed by the piece form a combination and stop work simultaneously and return their work in an unfinished and worthless condition, they are liable to their employer in damages, provided he cannot get other men to finish their work: **Mapstrick v. Ramge**, 9 Neb. 390; 31 Am. Rep. 415.

## COMMONWEALTH v. WALTON.

[182 PENNSYLVANIA STATE, 373.]

**CONSTITUTIONAL LAW—MUNICIPAL GIFTS—POLICE PENSIONS.**—A reasonable appropriation by a city to a corporation organized to create a fund to pension its members who are policemen is an appropriation to a strictly municipal use and necessary for the welfare and comfort of the city, and not in violation of a constitutional provision prohibiting the legislature from authorizing any city "to become a stockholder in any company, association, or corporation, or to obtain or appropriate money or to loan its credit to any corporation, association, institution, or individual."

**MUNICIPAL CORPORATIONS—DELEGATION OF POWERS.**—If a municipal corporation is satisfied that an appropriation by it to another corporation will be better distributed through the agency of the latter than through its own, it may provide for distribution by the former agency.

G. W. Pepper and J. G. Johnson, for the appellant.

J. L. Kinsey, city solicitor, and J. Alcorn, assistant city solicitor, for the appellee.

**374** STERRETT, C. J. In the relator's petition for the alternative writ, it avers, among other things, that it is a corporation, created by and existing under the laws of this state, whose objects, as defined by its charter, are to accumulate a fund from the dues of its **375** members, from legacies, bequests, gifts, and other sources, with which to pay pensions to members of the association and to families of deceased members; that its membership is two thousand three hundred and eight-six, including the director of public safety, the superintendent of police, all the police captains and lieutenants, two hundred and thirty-six sergeants, two thousand and thirteen patrolmen, sixty-seven patrol and van drivers, and thirty employes of the electric bureau; that it pays pensions to members who have become permanently incapacitated by reason of injuries received in the performance of actual duty, to members who have served fifteen years, whatever may be the cause of incapacity (excepting cases in which it results from the member's own vicious habits), to members who have served twenty-five years, and to the widow or children or dependent parents of a member killed in the discharge of his duty, etc; that in 1895 an ordinance was passed by the councils of said city of Philadelphia and approved by the mayor appropriating ten thousand dollars for the charter purposes of said pension fund association; that in January of that year a warrant for the payment of said sum was duly drawn by the director of the department of public safety and presented to the then city con-



troller, who refused to countersign the same; that his successor in office—the present controller—being unwilling to overrule the decision of his predecessor, declined to countersign the warrant; and praying that an alternative mandamus issue, etc.

In the city controller's return to the alternative writ all the facts recited in the petition are virtually admitted. The only reason he gives for his refusal to countersign the warrant is that the appropriation was to an association or corporation; and is in violation of law and of section 7 of article 9 of the constitution, which reads thus: "The general assembly shall not authorize any county, city, borough, township, or unincorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution, or individual."

In support of the demurrer to this return the following reasons were assigned: 1. The return admits facts which show that the relator is entitled to relief; 2. It discloses no legal ground for refusal to countersign the warrant; and 3. The <sup>376</sup> respondent has neither set up nor offered any matter or thing to defeat the right of the relator as disclosed by its petition.

The refusal of the court below to sustain the demurrer, and the entry of judgment thereon for the defendant, constitute the subjects of complaint in this appeal.

It is unnecessary to even outline the history of the constitutional prohibition above quoted. It had its origin in the amendment of 1857, which was prompted by the growing evils of reckless and extravagant municipal subscriptions to railroads, plank roads, etc. Those evils were so aggravated that it became necessary to interfere and prevent by a constitutional prohibition all future pledges of municipal faith and property for such purposes under the sanction of the legislature, which alone possessed the power to grant the proper authority: *Pennsylvania R. R. Co. v. Philadelphia*, 47 Pa. St. 193; *Speer v. School Directors*, 50 Pa. St. 163; *Brooke v. Philadelphia*, 162 Pa. St. 126.

In *Speer v. School Directors*, 50 Pa. St. 163, it was held "that money paid to save a community from a [military] draft is not obtained for a party or individual, but is a direct appropriation to a public purpose, and that raising money by the ordinary powers of borrowing and taxation for a common purpose, affecting the interest, happiness, and welfare of a community, is not obtaining money or loaning credit to any party within the terms of the amendment."

It is evident from an examination of our cases on the subject that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine municipalities to the objects for which they were created, and to restrain the legislature from authorizing any perversion of them. By the act of March 17, 1789, which appears to be still in force, the city councils of Philadelphia "have full power and authority to make, ordain, and establish such and so many laws, ordinances, and regulations as shall be necessary for the welfare and comfort of the city." We have no right to assume, nor is there anything from which it may be fairly inferred that the constitutional prohibition in question was intended to revoke or curtail any of the powers or authorities with which the city councils were theretofore invested by the comprehensive grant above quoted. It is not even suggested that a reasonable appropriation by councils for the creation or maintenance of a police pension fund is not an appropriation <sup>377</sup> to a strictly municipal use, and "necessary for the welfare and comfort of the city." A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves to every reflecting mind.

But aside from the general charter authority of councils to make such appropriations, and aside from any question of expediency or propriety in their doing so, this case might well be disposed of on the ground that the constitutional prohibition relied on by the defendant is inapplicable to councils. In *Indiana Co. v. Agricultural Soc.*, 85 Pa. St. 357, this court held that the section in question "deals only with legislative power. . . . That power is thereby limited and restricted. It declares what the legislature 'shall not' do. It annuls nothing that it had done. It forbids such legislation thereafter. It struck down no law. Its prohibitions were wholly prospective." It is not pretended that the ordinance in question was enacted in pursuance of any legislation passed since the adoption of the constitutional prohibition. It therefore follows that the latter has no application here.

There is no merit in the objection that councils delegated the distribution of the sum appropriated to the "Philadelphia Police

Pension Fund Association," instead of distributing it themselves. If they were satisfied, as they doubtless were, that the distribution of the fund would be better effected through the agency of the association than by any agency of their own creation, they had a right to so provide. As we have seen, the association was incorporated for the express purpose of administering such funds on just and equitable principles. If it should attempt to divert any of the funds to improper purposes, ample redress could be had by application to the proper court.

It follows from what has been said that the demurrer should have been sustained, and a peremptory writ awarded as prayed for.

Judgment reversed, and judgment is now entered in favor of the plaintiff on the demurrer, and peremptory writ awarded as prayed for.

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**MUNICIPAL CORPORATIONS—POWERS—AID GIVEN TO PRIVATE ENTERPRISES.**—A municipal corporation possesses no powers except those conferred upon it, expressly or by fair implication, by the law creating it, or statutes applicable to it. It cannot do any act, nor make any contract, nor incur any liability, not thus authorized: *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 823, and note. But all powers conferred upon it should be construed with a view of carrying out the purposes of its creation as a public agency: *Jacksonville etc. Co. v. Jacksonville*, 36 Fla. 229; 51 Am. St. Rep. 24, and note. Municipal corporations have been frequently authorized to subscribe to the stock of railroads and other corporations, upon the theory of the public nature of the enterprise: Monographic note to *Sharpless v. Mayor*, 59 Am. Dec. 782, 788. Such power must be express; it cannot be implied: Monographic note to *Sharpless v. Mayor*, 59 Am. Dec. 788. The supreme court of the United States has held that a municipal corporation could not be empowered to exercise the right of taxation in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited: Extended note to *Lowell v. Boston*, 15 Am. Rep. 57. So bonds issued simply for the purpose of making a donation of municipal funds to a private enterprise have been held invalid: *Bissell v. Kankakee*, 64 Ill. 249; 16 Am. Rep. 554. A city has no power to loan its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises: *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423, and note.

**MUNICIPAL CORPORATIONS—POWERS—DELEGATION OF.** Powers conferred upon a municipal corporation must be exercised by the municipality; and so far as they are legislative, cannot be delegated to others: *Chicago v. Stratton*, 162 Ill. 494; 53 Am. St. Rep. 325, and note; note to *Birdsall v. Clark*, 29 Am. Rep. 108-110.



**ROGERS v. PHILADELPHIA TRACTION COMPANY.**

[182 PENNSYLVANIA STATE, 473.]

**NUISANCE—LAWFUL BUSINESS AS.**—If a corporation has no right of eminent domain, the lawful operation of its works, causing special physical injury to another's property, is an actionable nuisance.

**NUISANCE—LAWFUL OPERATION OF WORKS AS.**—A street railway company without the right of eminent domain is liable for special injury to the property of another, caused by the lawful operation of its works.

Trespass for injury to property. Plaintiff owned property in Philadelphia. Defendant owned property in the rear of the former and erected thereon a powerhouse containing large and powerful engines and machinery to furnish power to move its cars. The issue was joined on a declaration charging that the defendant, "contrary to its duty, so carelessly and negligently erected its powerhouse and building and said machinery thereon, used and to be used, and so carelessly, wrongfully, and negligently ran and operated the same for a long period of time, to wit, at divers times since or before the first day of January, 1888, to the first day of August, 1890, that in consequence of the great and violent shaking, jarring, vibration, and concussion resulting from the said wrongful, negligent, and careless erection and construction of said powerhouse or buildings and said machinery, and wrongful, careless, and negligent use and operation thereof, the said plaintiff was grievously annoyed, disturbed, and injured in the reasonable and ordinary enjoyment of his said stores and dwellings and the business therein carried." The court overruled a demurrer to the statement. [1] Defendant requested instructions as follows: "1. The defendant, by its letters patent in evidence and the act of assembly by virtue of which the same were issued, had full authority to build, construct, and operate a cable for the traction of cars, and for that purpose to erect and operate upon its own land such stationary engines as are necessary to furnish power to said cable, without liability to the plaintiff for consequential damages to his property, the uncontradicted evidence being that no part of plaintiff's property has been taken, nor is any portion of the two buildings in contact, there being no use by the defendant of a party wall; but, on the contrary, its wall having been built upon its own land, leaving a space between it and the plaintiff's wall all the way from the bottom of the foundations to the top of the walls, so designed es-

pecially to prevent contact; the machinery and its foundations having been further isolated by being surrounded by an air space, and the best precaution known to the state of the art having been taken by the defendant to prevent the transmission of the noise and vibration, excepting as they may be conveyed by the bed of the earth beneath all foundations or by the atmosphere. The verdict should be for defendant. Answer: Refused. [2]"

"2. The defendant is incorporated for the purpose of, and is engaged in, operating a public work, to wit, the carriage of passengers along the public streets in cars drawn by an endless cable. The necessities of this operation and the character of the business compel it to seek the heart of the city as much for the convenience of the public as for its own. Hence, the maintenance of a powerhouse and stationary engines as near the center of its line through the center of the town as possible is in the direct line of its duty, and is part of the lawful enjoyment of its property and franchises; and, as it appears by the evidence, this was done without negligence or malice, it entails no legal liability. If unavoidable inconvenience falls upon neighbors, the same is *damnum absque injuria*. The verdict should be for defendant. Answer: Refused. [3]"

"3. The injury complained of is alleged to be exclusively due to the operation of the machinery, not to the construction of it or the powerhouse. As its operation is lawful and without negligence, and conducted upon defendant's own land, without contact or encroachment upon plaintiff's, there can be no recovery, and your verdict should be for defendant. Answer: Refused. [4]"

"4. This is not the case of a private individual maintaining upon his premises, in the heart of a dwelling quarter of the city, objectionable machinery which could be equally well placed in a more secluded spot, but it is the case of a cable railway, authorized by law to maintain a cable road in one of the most important and busy thoroughfares of Philadelphia, and as it appears that this machinery must necessarily be placed upon that thoroughfare, and has been built upon the company's own property and isolated from adjoining buildings, its maintenance is lawful. Answer: Refused. [5]"

"5. Under all the evidence the verdict should be for the defendant. Answer: Refused. [6]"

The court charged in part as follows: "I do charge you that if there was any special damage resulting to the plaintiff from the operation by the defendant of the defendant's works in that building, whereby the plaintiff lost rent or suffered in some other ways that have been described, he is

entitled to a verdict for the amount representing that injury. [7]." Verdict and judgment for plaintiff. Defendant appealed.

D. W. Sellers, for the appellant.

G. P. Rich and H. C. Boyer, for the appellee.

<sup>476</sup> STERRETT, C. J. Defendant company's fourth point for charge was affirmed, and all the others, containing binding instructions for defendant, were refused. In thus refusing to affirm either of the latter points, the learned trial judge was so clearly right that neither of the questions involved therein requires discussion, and they are accordingly dismissed without further comment.

In view of the testimony of plaintiff's witness, Hogan, and the admissions made on cross-examination by defendant's witness, Craig, the learned judge might well have submitted to the jury the question of defendant's negligence in the construction and operation of its machinery, and sustained a verdict on that ground; but, instead of doing so, he stated to the jury that he recalled no evidence of negligence on the part of the defendant, and proceeded to instruct them that if, in consequence of the operation by defendant of its machinery in the building, there was necessarily a special damage or injury suffered by the plaintiff, apart from what was common to the neighborhood and to people generally, the plaintiff might recover to the extent of the injury thus specially sustained. The correctness of this instruction is challenged in the seventh specification. In addition <sup>477</sup> to that, the defendant demurred to the second and third counts of the statement, because neither of them contained any averment of negligence, either in the construction or operation of defendant's machinery, etc. Refusal to sustain the demurrer is the subject of complaint in the first specification.

Under that ruling and the foregoing instructions, the jury found, on quite sufficient evidence, that plaintiff was specially damaged by the operation of defendant company's machinery, and a general verdict for the amount of the damages thus sustained by him was accordingly rendered and judgment entered thereon. This necessarily involves the question of defendant's liability in the absence of evidence of actual negligence; and that is the controlling question in this case.

By its charter act of incorporation of June 13, 1883 (Pub. Laws 123, sec. 6), the defendant company was created "for the construction and operation of motors and cables, and the necessary



apparatus and mechanical fixtures for applying and operating the same." So far as relates to this case, that is the extent of its powers. Its authority to hold real and personal estate necessary for its purposes does not in any way extend its charter power or privileges, and it is conceded that it is not invested with the power of eminent domain. There is certainly nothing in its charter to relieve the defendant from liability for the special injury which the plaintiff has suffered in consequence of its operations on its own land, as determined by the verdict. As an artificial person, it cannot, any more than a natural person, escape liability for special injury done to others, unless it can be shown that because it is a mere creature of the law it enjoys immunity from liability which natural persons do not; but no such proposition as that has ever been recognized in any well-considered case. No authority for it can be found in *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, or any of that line of cases. It is not only untenable in law, but it is lacking in reason. If several individuals had purchased defendant company's lot and erected thereon the machinery and appliances that it did, and had operated the same as it has done to the great and manifest and special injury of the plaintiff, no one would venture to question their liability to respond in damages.

In several cases, among which are *Pottstown Gas Co. v. 478* *Murphy*, 39 Pa. St. 257, and *Hauck v. Tidewater Pipe Line Co.*, 153 Pa. St. 366, 34 Am. St. Rep. 710, it has been held that where a corporation has no right of eminent domain, the operation of its works, causing special physical injury to another's property, is virtually an actionable nuisance. The first of these was the case of an incorporated gas company, authorized to supply gas to the borough and such individuals and corporations as might desire the same; to produce, sell, and distribute gas for the production of artificial light; to make and erect the necessary apparatus and manufactory introducing the same; to construct the necessary machinery; to purchase and prepare the necessary materials, with the right to enter upon any public street, lane, or highway, for the purpose of laying the necessary pipes, etc. The company, having purchased real estate necessary for carrying on its business, erected its works and put them in operation. The fluids percolated through the soil from the gasworks, contaminated the water in plaintiff's well, and injured his property, for which he brought suit. The defense was that the gas company,

being authorized by law to erect and operate its works for the purpose of manufacturing gas for the public, was not responsible for the injury, unless shown to have been caused by its negligence. It was held that this defense could not be sustained. Mr. Chief Justice Lowrie, speaking for the court, said: "The defendants think that as a corporation authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where a corporation clothed with a portion of the state's right of eminent domain takes private property for public use on making proper compensation, and where such damages are not part of the compensation required." This case was afterward cited with approval and the principle thereof reaffirmed in *Hauck v. Tidewater Pipe Line*, 153 Pa. St. 366; 34 Am. St. Rep. 710. In the latter, the defense was that the business of the defendant company was not only lawful, but it was conducted with due care, and that, in the absence of evidence that the escape of the oil was due to the negligence of the company, the latter was not liable. In holding that this defense was untenable, this court, approving and adopting that <sup>479</sup> portion of the learned trial judge's charge embraced in the tenth specification, said: "If the mere fact that the business is a lawful business and has been conducted with care would be a defense where a neighbor's land has been injured in consequence of the business carried on there, the escape of gas, for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation under the law of this state. Hence there are cases, and a great many of them, where a defendant is held liable in damages although his business is lawful and he has exercised care in carrying it on."

Other authorities to the same effect might be cited, but, in view of the evidence and the facts established by the verdict, enough has been said to show that the defendant company has no just reason to complain of the ruling of the learned trial judge or his instructions to the jury. Neither of the specifications of error is sustained.

Judgment affirmed.

**NUISANCE—LAWFUL BUSINESS.**—A trade or business, though lawful and useful, is a nuisance if it interferes with the reasonable enjoyment of neighboring property, or injures the property itself: *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595; note to *Kaje v. Chicago etc. Ry. Co.*, 47 Am. St. Rep. 629. A business which is not a nuisance per se may become such by reason of the particular locality in which it is situated: *Wylie v. Elwood*, 134 Ill. 281; 23 Am. St. Rep. 673, and note. See *Shively v. Cedar Rapids etc. Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471, and note; note to *State v. Taft*, 54 Am. St. Rep. 771; *McMorran v. Fitzgerald*, 106 Mich. 649; 58 Am. St. Rep. 511, and note; extended note to *Rouse v. Martin*, 51 Am. Rep. 467-475.

**NUISANCE—LAWFUL BUSINESS—DAMAGES.**—Damages are recoverable for carrying on a lawful trade in such a manner as to constitute a nuisance: *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254, and note; *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402; 46 Am. St. Rep. 736; note to *Appeal of Pennsylvania Lead Co.*, 42 Am. Rep. 540-542.

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## McNULTY v. PENNSYLVANIA RAILROAD COMPANY.

[182 PENNSYLVANIA STATE, 479.]

**RAILROADS—EMPLOYÉ WHEN PASSENGER.**—An employé of a railroad company, who is carried to and from his work on a train in consideration of a reduction in the price of his wages, is a passenger while being thus carried.

**RAILROADS—EMPLOYÉ WHEN PASSENGER—NEGLIGENCE OF FELLOW EMPLOYÉ.**—An employé of a railroad company, who, in addition to his wages, is given free transportation to and from his work as part of the consideration for the services rendered, is a passenger while being thus transported. If then injured or killed through the negligence of another employé of the railroad company, the latter is liable therefor.

D. W. Sellers, for the appellant.

P. F. Rothermel, Jr., for the appellee.

481 **STERRETT, C. J.** The first and third specifications of error are intended to present what may be regarded as the controlling question in this case: Whether, upon the undisputed facts, the relation of plaintiff's husband to the defendant company at the time he was killed, in the collision that occurred on October 28, 1894, was that of a passenger being transported in one of its cars, or that of an employé then in the service of the company. These specifications are as follows:

1. In refusing to charge, as requested in defendant's first point, "that McNulty was carried by defendant in the performance of a contract of employment and service, and was in law not a passenger but an employé; and as he was injured by a col-



lision due to the negligence of the engineer, the verdict must be for the defendant."

2. "In charging the jury that the decedent was a passenger." This specification was doubtless intended to embrace that part of the charge in which the learned trial judge refers to the relation of the deceased to the defendant company at the time of the collision. If so, it offends against rule 23, which provides that "the part of the charge . . . referred to must be quoted totidem verbis in the specification." Turning to the charge sent up with the record, we find that, as to the contractual relation existing between the deceased and the defendant and the circumstances attending the collision in which he lost his life, etc., the learned judge said:

"It appears that the husband was an employé of the railroad company. He was employed to work on a bridge at Tacony, in this county, under a contract of employment by which he was to receive one dollar and twenty cents a day, and the company also contracted to transport him from his home to the place where his work was to be performed, and from that place back to his home at night when his work was over. The dead man lived at Bristol in the adjoining county, and upon the Sunday when he met his death he <sup>482</sup> had finished his work about fifteen or twenty minutes after 6 o'clock, and he, with other workmen employed upon the bridge at Tacony, entered a passenger-car of the Pennsylvania Railroad Company, and the car then proceeded toward Bristol. It stopped at a station called Croyden, situated between Tacony and Bristol, and while there at rest, or when about to come to rest, a freight train of the Pennsylvania Railroad Company, upon the same track, crashed into the rear end of the car, and the plaintiff's husband was killed. It was argued to the court that under a statute of our state and under the general law a railroad company was not liable in damages in such a case as this, because McNulty was an employé of the company at the time of the accident, and that the company is not liable to the employé, who is injured through the negligence of another employé. In passing upon the motion of a nonsuit, I stated and I now charge you that, under the contract of hiring in this case, the services, the work, the employment of McNulty ceased when he quit work at Tacony, and that while he was being transported to his home over the tracks of the railroad company he was not an employé then in its service; and, therefore, the injury which he suffered and which resulted in his death did not come to him

while he was in the employ of the company. . . . He was not in the employ of the company, but was being transported over the road for a valuable consideration, under a contract, it is true, which involved his employment, but a contract in which the transportation and the wages were a return for services rendered, and therefore it became the duty of the company to transport him with care and with due regard for his safety."

It is unnecessary to refer in detail to the testimony. A careful examination of the record clearly shows that the foregoing instructions were in strict accord with the undisputed evidence in the case. The conclusively established facts as to the contractual relation of the parties are not susceptible of any other conclusion than that the transportation of plaintiff's husband from and to his home in Bristol was part of the consideration moving from the company to him, and given him, with the one dollar and twenty cents, in payment of a day's wages. That being so, he had virtually paid for his passage home in the car in which he was riding at the time of the collision, and was, therefore, a passenger, and not an employé, as soon as his day's work was done and he entered the <sup>483</sup> car for the sole purpose of being carried home. In its controlling features this case is on all fours with *O'Donnell v. Alleghany R. R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336, in which Mr. Justice Agnew, after referring to the contract of hiring in that case, says: "The work of the plaintiff was wholly at the bridge, . . . at the time of the accident he had finished his day's work, and was ten or twelve miles from the bridge on his way home. Under these circumstances, the court below instructed the jury that the plaintiff was traveling as a passenger, and not in the capacity of a servant. . . . He was not hired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed he was no longer in the service of the company, but was free to go or stay and, when he traveled, in effect paid his fare out of his wages."

As was clearly shown in *O'Donnell v. Alleghany R. R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336, the cases of *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384, and *Tunney v. Midland Ry. Co.*, L. R. 1 Com. P. 291, are clearly distinguishable from the one now under consideration. The plaintiff in the former was a laborer on a gravel train. In the exercise of his employment he was required to be on the train. The loading and unloading of gravel necessarily required the hands employed in that work

to travel with the train from place to place. He traveled not as a passenger to any particular destination, but went with the train whenever it became necessary to obtain or deposit gravel. His traveling on the cars, like that of a brakeman or a fireman, was in pursuance of his employment, and not under a contract with the company for transportation to his home or elsewhere. In the other case, it was part of Tunney's employment as a laborer for specific wages to travel from Birmingham to Derby on a train called the "pick-up" train, for the purpose of gathering up materials left along the line of the road; and he was required to be ready for the train at Birmingham and start thence on his trip and return there. The case was put distinctly on the ground that it was part of Tunney's "contract of service that he was to return each day to Birmingham by the pick-up train to be ready to start upon his work the next morning."

In the case at bar, the transportation from and to his home to which the deceased, McNulty, was entitled was not in any sense a service or connected with any service that he was rendering <sup>484</sup> to the defendant company, but it was a service which the latter, by the terms of its contract, was required to render to him. He was under no obligation to ride on the cars, but there was an obligation on the part of the company to afford him an opportunity of doing so, if he saw fit to avail himself of it; and when he exercised the right to which he was thus entitled, and entered the car for the sole purpose of being transported to Bristol, he was a passenger in the full sense of the word, and not an employé of the defendant. Before he did so his day's service to the company was fully completed, and he had earned the one dollar and twenty cents, together with the right of transportation to Bristol.

The point for charge recited in the second specification was rightly refused, for the reason that there was no evidence in the case to bring it within the provisions of the act of April 4, 1868. As we have seen, plaintiff's husband, according to the undisputed evidence, was a passenger and not an employé at the time of the collision, and hence, by the express terms of the act itself, it has no application to the case.

The question of defendant's negligence as the sole cause of McNulty's death has been definitely determined by the verdict, rendered under adequate and proper instructions. The question of contributory negligence of the deceased was not even suggested.



Further elaboration of the questions involved in the assignments of error is unnecessary. We find nothing in either of them that would justify a reversal or modification of the judgment.

Judgment affirmed.

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**RAILROADS—EMPLOYÉS, WHEN DEEMED PASSENGERS.**—One who is employed as a clerk of a railway corporation, subject to be discharged at any time, and who resides out of the city in which his work is to be done, and who, under a uniform custom on the part of the corporation with respect to its employés residing out of the city, is furnished with a pass to his home over its line, and who rides upon such pass, is not to be deemed a gratuitous passenger. The pass is a part of the compensation for his services, and gives him the same rights as if he paid therefor in money: *Doyle v. Fitchburg R. R. Co.*, 166 Mass. 492; 55 Am. St. Rep. 417, and note. See monographic note to *Illinois etc. Co. v. O'Keefe*, ante, p. 75, as to who are passengers and when they become such.

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## LENNIG'S ESTATE.

[182 PENNSYLVANIA STATE, 485.]

**ASSIGNMENT OF EXPECTANT INTEREST.**—A conveyance or assignment of something which the assignor does not own and may never own is not operative at law, and to be operative in equity, must be founded upon a valuable, not merely a good, consideration.

**ASSIGNMENT OF EXPECTANT INTEREST UNDER WILL.**—An assignment of an expectant interest under a will, not based upon any consideration and made during the testator's lifetime, cannot be enforced against the assignor, after the testator's death. Such assignment cannot be sustained, either as a gift, nor as a family settlement, in the absence of any dispute as to any claim of interest or title which the grantee has or might have in the estate of the testator, nor does the fact that such grantee abstained from efforts to obtain a codicil to such will, create a sufficient consideration to support the instrument as an equitable assignment.

J. G. Johnson, for the appellant.

L. Melick, for the appellees.

**492 GREEN, J.** The subject of contention in this cause is the distribution of a fund constituting the estate of Williamina Lennig, amounting to about one hundred and eighty thousand dollars. The decedent left a will, wherein she bequeathed the whole of the fund to Williamina Thudicum, a daughter, and two granddaughters, Joyeuse and Williamina Fullerton. These three legatees have the prima facie title to the fund, because it is given to them by the will of the last owner, the present testatrix. But

the appellant, as trustee for his three <sup>493</sup> children, claims one-third of the fund by virtue of a paper duly executed by the three legatees in the lifetime of the testatrix. The paper is dated February 28, 1891, and the testatrix died September 15, 1893. The contents of the will were known to all the parties at the time of the execution of the paper mentioned. The appellant, John B. Lennig, trustee, was a son of the testatrix and her deceased husband, Charles Lennig, and the three children of the trustee were her grandchildren. The paper in question was an agreement on the part of Williamina Thudicum, Williamina Fullerton, and Joyeuse Fullerton that the share of Charles Lennig's estate which the testatrix received as his widow, claiming under the law and against his will, should be equally divided in the following manner, to wit: "One full third part thereof shall be paid to Williamina Thudicum absolutely. One other equal third part thereof shall be equally divided share and share alike between Williamina Fullerton and Joyeuse Fullerton. And one other equal third part thereof shall be equally divided share and share alike amongst the present and future children of John B. Lennig and for this purpose shall be paid to the said John B. Lennig as their trustee."

After having read all the testimony in the case with most careful attention, we are clearly of opinion that this paper was voluntarily executed by the parties to it, with a full knowledge of its contents, and with the intent that the instrument should do precisely what it purported to do, to wit, transfer to the children of John B. Lennig through him as trustee, one equal third part of that part of the estate of the testatrix which she derived from her husband's estate. It is perfectly manifest to us that there was no fraud, imposition, mistake, misrepresentation, or undue influence exerted or existing in the minds of the parties to the instrument at the time of its execution or at any time afterward.

Upon this branch of the case we concur entirely with the findings and views of the learned auditing judge, and, if the decision of the case depended alone upon these considerations, we would reverse the decree, and award the one-third of the fund to the appellant as trustee. But there is a fundamental question lying back of the instrument, and the evidence affecting it, which, as it seems to us, is fatal to the appellant's claim. It is this, and <sup>494</sup> it arises in this manner: The fund in controversy belonged to the testatrix absolutely, and she could dispose of it as she

pleased. She has given it to her daughter and her granddaughters, and she refused to give any part of it to the appellant's children, when she had the opportunity to do so by means of a codicil to that effect, which she was asked to sign, but refused. We mention this incidentally, and not because we think it is vital to the decision. We see no reason to discredit the positive testimony of Dr. Fricke in relation to the codicil which he presented to the testatrix for her signature. The claim of the appellant therefore rests exclusively upon the effect, in any legal or equitable sense, of the paper signed by the daughter and granddaughters of the testatrix. While it must be conceded that, although they were mere expectant legatees at the time they signed the paper, they subsequently became absolute owners of the fund by reason of the testatrix dying without having made any change in her will, yet they now claim that they have changed their minds, that they desire the whole of the estate themselves, that they formally revoked the grant made, by another instrument duly executed, but, over and above all, that the instrument they did execute was never obligatory upon them, and conveyed no estate or interest to the appellant or his children. The blunt question therefore arises, Can that instrument be enforced against them contrary to their will? If it was a good conveyance, operative from its date, or if it became effectually operative from the death of the testatrix, it could not now be recalled or rescinded by any act of theirs, and hence the formal rescission by the paper of June 12, 1893, is not of very material consequence except as notice that the parties to it were determined to resist all claim under the former paper, and were no longer agreed that the appellant or his children should have or take any part of the fund under the original instrument. The question now recurs, Does that instrument confer a good title which can be enforced either at law or in equity? The difficulty about it grows out of the peculiar character of the subject matter of the instrument. It was an estate in expectancy only. The grantors had no present estate or interest in the property at the date of the grant. It was the property of the testatrix, and she might at any time, up to the moment of her death, revoke her will and give the estate to other persons. The <sup>495</sup> instrument was therefore an attempted conveyance of something that did not then belong, and might never belong, to the persons assuming to convey it. There are plenty of authorities in relation to this species of assignment or grant, but the sum of



the whole of them is that at law they convey nothing, and in equity they must be founded upon a valuable, not merely a good, consideration. In *Bayler v. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551, a married woman, her husband joining, executed a mortgage to secure a debt of the husband, upon all her estate, right, title, and interest, which she would be entitled to receive from her father's estate. When, after the father's death, the creditor attempted to enforce it, we held it could not be done, because the estate mortgaged was only an expectancy, that it was invalid at law, and in equity there was no sufficient consideration to sustain it. Strong, J., delivering the opinion, said: "The mortgage given by Mrs. Jay and her husband to Henry Bayler was not a pledge or conveyance of any estate which she owned at the time of its execution. . . . Her father was then living. In his estate she had no property—no interest. The subject of the mortgage was therefore nothing that she then had. It was a mere expectancy, and the instrument of mortgage was made, not for any consideration then received by her or parted with by the mortgagor, but solely for the purpose of securing a prior debt of her husband. . . . It is an old and well-settled rule of the common law that a mere possibility cannot be conveyed or released; and the reason given for it is that a release or conveyance supposes a right in being. . . . At law, therefore, nothing passes by a deed of land of which the grantor is only heir apparent. Certainly, nothing by its direct operation. But though conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration." In *Power's Appeal*, 63 Pa. St. 443, we said, Reed, J.: "An heir or expectant devisee or legatee may, in the lifetime of the intestate or testate, sell or assign his expectant or contingent interest, whatever it may turn out to be, upon the death of a person from whom it may come, which contract, if made upon a valuable consideration, a court of equity will enforce." Citing from *Snell's Principles of Equity*, page 72, the opinion proceeds: "A mere expectancy, therefore, as that of an heir at law to the estate of an ancestor, or the interest which a <sup>496</sup> person may take under the will of another then living, nonexistent property to be acquired at a future time, as the future cargo of a ship, is assignable in equity for a valuable consideration. . . . The interest which a child has in his orphanage part is a mere contingency, and no present right, and therefore a release of it is not valid in point of law; but, if found-

ed on a valuable consideration, it shall operate as an agreement, and be binding in equity."

In Kuhns' Estate, 163 Pa. St. 438, our brother Williams, delivering the opinion, said: "At law, a valid transfer can be made of anything in actual existence. What the assignor has he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to. But such sales and assignments have been sustained in courts of equity whenever good conscience seemed to require it, and not otherwise. . . . If the consideration for such an assignment is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignee's title accrues, and it will be held to take effect as an assignment when the expectant interest vests in the assignor. . . . Was the assignment to Julia Ann Kuhns good in equity? This must depend on the bona fides of the transfer and the adequacy of the consideration."

There is great abundance of authorities to the same effect, and it is not necessary to cite more of them. They are not really disputed. Recognizing their force, the appellant contends that, in this case, there was sufficient consideration for the agreement in question on two grounds: 1. Because of its being a family settlement; and 2. It led to a discontinuance of efforts to procure the execution of a codicil to the will, in favor of the appellant's children.

We do not see how the paper can be regarded as a family settlement. There was nothing in dispute; there was no title or claim of title of any kind residing in the appellant's children; there was no doubt existing about any question at issue between the parties as to the title to any interest in the estate of the testatrix on the part of the children of the appellant. So far as there could be any title or pretense of title before the death of the testatrix, the persons signing the paper were the only persons having any interest whatever. Their interest was but an expectancy at the best. While such an interest would have <sup>497</sup> been sufficient to bind them, it could only do so by virtue of an actual and valuable consideration passing to them from the grantees. But there was no controversy or dispute between the parties about any claim of interest or title which the grantees had or might have in the estate of the testatrix, and hence we cannot see how the paper can be regarded as a settlement of a dispute or controversy. If they had even a doubtful claim, although it were found afterward that it could never have been

realized, still it would probably be regarded as sufficient to sustain an actual settlement. But here there is nothing which can be regarded as having even the semblance of a claim upon which to raise any kind of a consideration. In *Wistar's Appeal*, 80 Pa. St. 495, which was a bill in equity founded upon an agreement which was claimed to be a family settlement, and where actions of ejectment had been brought and were pending for trial when the agreement was made, and in which the master found that the plaintiffs were entitled to the relief sought on the ground that the agreement was of the character claimed, this court reversed the master and court below, and dismissed the bill, Mr. Justice Sharswood, delivering the opinion, said: "It is certainly true that all agreements for the compromise and settlement of family disputes are favorably regarded, both in courts of law and equity, and are supported not only as beneficial in themselves, but as conducing to peace and harmony where it ought most especially to exist. . . . But the principle is not to be carried so far as to work practical injustice. Especially it ought not to override every other rule upon which courts of equity proceed in the enforcement of the specific performance of contracts. A bill for that purpose is always an appeal to the conscience of the chancellor, in which he exercises a sound discretion under all the circumstances, and he will not interfere if the bargain is hard or unconscionable, or the terms unequal, or the complainant is taking an undue advantage from the strict legal construction of the words. . . . In the compromise of family disputes, particularly, the agreement of compromise should be complete in itself, not a mere plan looking to a future adjustment of the details; more especially when, so far from settling the family difficulties, it will be itself merely the germ of future litigation. Otherwise, instead of promoting peace and harmony, it may be the source of prolonged discord and discussion."

498 In the present case, it will be observed that the agreement is entirely one-sided. The parties who signed the paper merely gave away their expected rights to the whole estate of the testator, and got nothing in return. The children of the appellant had nothing to give, and did not agree to give anything. If the paper could be sustained as a gift, it would answer the purpose, but that cannot be, because the thing given had no existence, and, as a gift, under all the authorities, it cannot be sustained. In *Grove v. Hodges*, 55 Pa. St. 519, Strong, J., said: "Mutuality of obligation is considered, perhaps, more frequently



in courts of equity than those of law. In bills to enforce the specific performance of contracts, which, of course, have to do with executory contracts, it is a constant inquiry what equities the defendant has against the complainant, and a chancellor will not enforce specifically a contract that is one-sided." In Bispham's Principles in Equity, fifth edition, page 489, it is said: "It is essential to specific performance that the consideration should be valuable; a merely good consideration, such as natural love and affection, or the performance of a moral duty, will not be sufficient. Moreover, it is necessary that the consideration shall be actual. A constructive consideration, such as that imported by a seal to a bond, will not do." In Kennedy v. Ware, 1 Pa. St. 445, 44 Am. Dec. 145, Gibson, C. J., said: "An equitable assignment of a chose in action is said by Mr. Butler (Coke on Littleton, 232 b, note 1) to be a declaration of trust, with an agreement to permit the assignee to sue in the assignor's name. The contract, being consequently executory, must have a consideration to support it, without which equity would no more execute it than the law would make the breach of it a subject of compensation. . . . Consanguinity is sufficient to raise a use; but that that is not a consideration for an assignment like the present is shown by Bret v. J. S., Cro. Eliz. 756, where it was held that natural affection is not a sufficient consideration for an assumpsit to ground an action. . . . What then was the consideration of the assignment before us? Kennedy, whose executors are sued on a parol agreement to convey land to his son in law, Ware, assigned by the instrumentality of his son, to whom he had conveyed his estate in special trust, a judgment against Avery in advancement of his daughter, Ware's wife. The trust being subsequently revoked and the estate reconveyed, <sup>490</sup> Kennedy promised to convey to Ware a particular lot of land in lieu of part of the judgment which was reassigned to him. The judge charged that the promise would sustain the action; but, according to the cases brought into view, the first assignment of the judgment, being in consideration of natural love and affection, was void; and as Ware had nothing in it to give back, Kennedy's promise to convey on the foot of it was also void. The partial rescission of the first assignment was not the compromise of a contested right, and there was therefore no consideration for the agreement on that or any other ground."

For the reasons stated, we are unable to regard the instrument in question as a family settlement, or as being founded

upon any consideration. The only other point suggested in this connection is the proposition that in consequence of the agreement further efforts to obtain a codicil to the will of Mrs. Lennig were abandoned, and this may be regarded as a sufficient consideration to support the agreement as an equitable assignment. We find ourselves quite unable to assent to this contention. There is no evidence that we can discover of any agreement on the part of Mrs. John B. Lennig, or her children, to desist from further efforts to obtain from Mrs. Lennig the execution of a codicil in favor of the children, and while it may be that no such further effort was actually made because of the agreement, that circumstance could not operate as proof of a restrictive agreement against further efforts. But even if there had been a positive agreement to make no further efforts to obtain a codicil, we cannot regard such a stipulation as a valid condition possessing the force of a valuable consideration. An agreement not to importune an aged and infirm invalid to make a testamentary disposition in favor of a party may be a very proper stipulation for the party to make, because such conduct would be reprehensible upon considerations of policy and sound morality, but that it can be held to be a valuable consideration for the conveyance of an expectancy in the estate of such a person is a very different proposition. While children may reasonably solicit their parents to make a testamentary disposition in their favor, they certainly should not do so at the risk of annoying and distracting such parents or other persons when in conditions of sickness and suffering. It would certainly be an evil <sup>500</sup> policy for the courts to give countenance to such proceedings by recognizing them as the legitimate basis of a contract right. We cannot regard the argument, or inference of such a result in this case, as the foundation of a lawful right to recover the estate of such a person when deceased, upon the theory that it constituted the basis of a valuable consideration for the assignment of an expectant interest in such estate.

Entertaining these views, we are obliged to sustain the decree of the court below, while we would have been very glad to reach a different result if that were possible.

The decree of the court below is affirmed and appeal dismissed at the cost of the appellant.

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**EXPECTANCIES—ASSIGNMENT OF—ENFORCEABILITY OF.** While an assignment, transfer, or other disposition of an expectancy of an inheritance is invalid at law, it may, when not contrary to pub-

lic policy, be enforced in equity; and agreements for the sale, assignment, or release of such expectancies, if fairly made and for an adequate consideration are enforced in equity, upon the death of the ancestor. This proposition is supported by the current of authority: Monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 344, on the assignment of expectancies. See, also, *Hale v. Hollon*, 90 Tex. 427; 59 Am. St. Rep. 819, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**RHODE ISLAND.**

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**MASON v. WHEELER.**

[19 RHODE ISLAND, 21.]

**POWERS—EXECUTION OF—INTENTION.**—An instrument cannot be given effect as an execution of a power unless the intention of the donee of the power to execute it is so apparent that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention is doubtful, the doubt will prevent the instrument from being deemed an execution of the power.

**POWERS—EXECUTION OF POWER OF APPOINTMENT BY A RESIDUARY CLAUSE IN THE DONEE'S WILL.**—If a testatrix gives to her husband, subject to his right of curtesy, all her estate in trust to pay over the income to her daughter during her life, with direction that, upon the daughter's death, the trust estate shall be conveyed and paid over to such persons as the daughter shall by will appoint, and that, in default of such appointment, it shall go to a designated class, and the daughter dies, leaving a will, in which, after providing for the payment of debts, etc., and giving pecuniary and other legacies, she devises the residue of her estate, "real" and personal, to her father, should he survive her, but the will does not refer to the power and makes no mention or reference specifically to the property which is subject to the power, and the father survives the daughter, such residuary clause does not execute the power of appointment, as the daughter's intention to execute it is doubtful.

Bill in equity, for discovery and an account, brought by Matilda Mason against Laura Wheeler and others. The hearing was had on the pleadings and proof.

Joseph C. Ely and Herbert Almy, for the complainant.

Edward D. Bassett and Edward L. Mitchell, for the respondent, Laura Wheeler.

<sup>21</sup> MATTESON, C. J. This is a bill for discovery and an account. The case is as follows: Adeline M. Wheeler, of Cranston, died March 12. 1882, leaving a last will and testament, duly admitted to probate, in which she devised unto her husband, Jonathan M. Wheeler, subject to his tenancy by the curtesy, all her estate, in trust, to pay the income to her daughter, Emma Louise, wife of Charles Blake, for her sole and separate use during the term of her natural life. On the decease of Mrs. Blake, the testatrix directed that all of the trust estate and fund then remaining should be conveyed and paid over to such persons and for <sup>22</sup> such use as Mrs. Blake should by her last will and testament direct and appoint, but, if she should die leaving no last will and testament directing the disposition of said estate, it should descend to and be distributed among those who would be entitled to it according to the statute of descent and distribution at that time in force in this state, as if she, the testatrix, had then died intestate.

Mrs. Blake died May 26, 1890, leaving a last will and testament dated August 6, 1884, duly admitted to probate, in which, after providing for the payment of debts, funeral charges and expenses of settling her estate, giving a pecuniary legacy and disposing of certain articles of personal property, she gave, devised, and bequeathed the residue of her estate in the following terms, namely: "I give, devise, and bequeath to my father, Jonathan M. Wheeler, all the rest and residue of my estate real and personal of every name and nature and wheresoever situated or being to him, said Jonathan M. Wheeler, his heirs and assigns forever, should he survive me."

The question arising on these facts is, whether or not the devise in the will of Mrs. Blake to her father, Jonathan M. Wheeler, was an execution of the power of appointment conferred on Mrs. Blake in the will of her mother, Mrs. Wheeler.

The rule in relation to the execution of powers, as stated by Mr. Justice Story, in *Blagg v. Miles*, 1 Story, 446, which may be regarded as a leading case in this country on the subject, is that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention be doubtful, the

doubt will prevent the instrument from being deemed an execution of the power. It is not necessary, however, that the intention to execute should appear by express terms or recitals in the instrument; it is sufficient if it appears by words, acts, or deeds demonstrating <sup>23</sup> the intention. In the case referred to, three classes of cases are enumerated which have been held to be sufficient demonstrations of an intended execution of a power: 1. Where there has been some reference in the will or other instrument to the power; 2. A reference to the property which is the subject on which the power is to be executed; 3. Where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity; in other words, would have no operation except as an execution of the power: And see *Cotting v. De Sartiges*, 17 R. I. 668; *Lee v. Simpson*, 134 U. S. 572; *Patterson v. Wilson*, 64 Md. 193; *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136; *Bilderback v. Boyce*, 14 S. C. 528.

The devise to Mrs. Blake is in terms a general residuary disposition of all her estate, real and personal. It does not recite nor refer to the power in the will of Mrs. Wheeler; nor does it mention nor refer specifically to the property of Mrs. Wheeler, the subject on which the power was to be exercised. In order, therefore, to operate as an execution of the power, it must appear that Mrs. Blake intended by this devise and bequest, notwithstanding these omissions, to convey not merely her own property, but that which was her mother's as well; and the intention must be so apparent and clear that the devise and bequest will not fairly be susceptible of any other interpretation. Such intention might be inferred, as we have seen, if the clause would be ineffectual for any purpose except as an execution of the power. It was conceded at the hearing that Mrs. Blake had no real estate of her own on which the devise could operate, and it was contended for the respondent, Mrs. Laura Wheeler, that the use of the word "real" in the devise was sufficient evidence of an intention to execute the power. We do not deem the use of the word "real" so conclusive that it cannot fairly be said that the intention to execute the power is not doubtful, and if not, it cannot be held that the power was executed. As suggested by the complainant, the clause is a residuary clause, purporting on the face of it to devise only the estate of Mrs. Blake, and the word "real" may well have been intended <sup>24</sup> merely to guard against a possible intestacy, and, therefore, there is no



necessary presumption from the use of the word that Mrs. Blake had in mind the real estate of her mother and intended to pass the title to it by the exercise of the power. Moreover, it is suggested, as an additional reason for not making such a presumption, that under the will of Mrs. Wheeler, Mrs. Blake's receipt of the income of the real estate was subject to the tenancy by the curtesy of her father, and that, as her father survived her, she never was, in fact, entitled to receive, and did not receive, the income of the real estate at all, and, consequently, would not naturally regard or speak of that real estate as her own. To this may be added the fact that her father was by the terms of her mother's will entitled to the income of the real estate during his life; there was less reason on that account for the exercise of the power for his benefit.

It was further contended at the hearing that Mrs. Blake did not have any personal estate on which the clause could operate, and, therefore, an intent to exercise the power ought to be inferred, since the devise and bequest would otherwise be a nullity; but, assuming that the testimony admitted *de bene* was competent, it did not show that she was not possessed of personal estate. On the contrary, it did show that she was possessed of valuable jewels, silverware, bric-a-brac, a piano, money on deposit, and other property on which the clause could operate.

We are of the opinion that the residuary clause in the will of Mrs. Blake did not execute the power of appointment conferred on her by the will of Mrs. Wheeler and that the complainant is entitled to the relief sought by the bill.

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**POWERS—EXECUTION OF—INTENTION.**—An act manifesting an intent to execute a power will be deemed an execution of it: *McCreary v. Bomberger*, 151 Pa. St. 323; 31 Am. St. Rep. 760. An intention to execute a power sufficiently appears: 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject matter on which the execution of the power is to operate; 3. Where the instrument of execution can have no operation unless in execution of the power: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420.

**POWERS OF APPOINTMENT—EXECUTION OF.**—One clothed with a power of appointment must execute it in good faith for the end and purpose designed: *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186. If a discretionary power is not exercised, the whole of the objects who are within it will take in equal shares: *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186. Compare monographic note to *Johnson v. Cushing*, 41 Am. Dec. 705, on interest of donee in power of appointment. A power of appointment may be executed, though not referred to, by a will disposing of the property, where there is nothing for the will to act on except in execution of the power: *Cathey*

v. Cathey, 9 Humph. 470; 49 Am. Dec. 714. Powers of appointment exercised in accordance with the power will be sustained; others will be rejected: Note to Thrasher v. Ballard, 25 Am. St. Rep. 901.

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## ALLEN v. ALLEN.

[19 RHODE ISLAND, 114.]

**WATERS—SHORE OF TIDE WATER—RIGHT OF RIPARIAN PROPRIETOR.**—A riparian proprietor whose land borders upon tide water has a right in the nature of a franchise or easement in the shore between high and low water mark.

**WATERS—SHORE OF TIDE WATER—FEE OF, IS IN THE STATE.**—The fee of the shore on tide water between high and low water mark is in the state as trustee for the public.

**FISHERIES—RIGHT TO TAKE SHELLFISH ON SHORES OF TIDE WATER.**—Shell fisheries are public rights, and, in the absence of an express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time, though he finds it necessary, in doing so, to dig up the grass or sedge.

**FISHERIES—PARAMOUNT RIGHTS.**—The public right of fishery is paramount to the private right to cut grass or sedge.

**TRESPASS—DISTURBING THATCH IN DIGGING FOR CLAMS.**—It is not trespass to disturb a thatch in digging for clams on the shores of tide water, between high and low water mark.

Action of trespass *quare clausum fregit*. The declaration described plaintiff's close as bounded by Narragansett Bay. The alleged trespass proved was the destruction of a thatch bed, which run out from the upland, below high-water mark, by digging for clams therein. The defendant petitioned for a new trial.

Samuel W. K. Allen, for the plaintiff.

Frederick C. Olney, for the defendant.

**115 PER CURIAM.** A riparian proprietor whose land borders upon tide water has, by the common law, certain private rights to the shore between high and low water mark. These do not amount to seisin in fee, but are in the nature of franchises or easements: *East Haven v. Hemingway*, 7 Conn. 186, 202; *Simons v. French*, 25 Conn. 346, 352; *Lockwood v. New York etc. R. R. Co.*, 37 Conn. 387. The right to build wharves and to fill out the upland may be exercised, as against anyone but the state, provided navigation is not impeded, or a nuisance created thereby: *Engs v. Peckham*, 11 R. I. 210; *Bailey v. Burges*, 11 R. I. 330. Some of these rights may be alienated or annexed to other upland estates, as the right to cut sedge or grass: See citation by Potter, J., in *Providence Steam Engine*

Co. v. Providence etc. S. S. Co., 12 R. I. 348, 369; 34 Am. Rep. 652; and the right to take seaweed which is stranded on the beach: Bailey v. Sisson, 1 R. I. 233; Kenyon v. Nichols, 1 R. I. 106; Hall v. Lawrence, 2 R. I. 218; 57 Am. Dec. 715; Knowles v. Knowles, 12 R. I. 400. When it is necessary or convenient, these alienable rights may be defined by boundaries, but this circumstance does not enlarge the character of the right.

The state holds the legal fee of all lands below high-water mark as at common law, as has been uniformly and repeatedly decided by this court: Bailey v. Burges, 11 R. I. 330; Engs v. Peckham, 11 R. I. 210, 224; Brown v. Goddard, 13 R. I. 76, 81; Folsom v. Freeborn, 13 R. I. 200, 204. By the common law of Massachusetts and Maine, based upon or declared by a colonial ordinance, the fee in lands to a certain distance below high-water mark was given to the upland proprietor, <sup>116</sup> and this rule applies to such portions of our shore as have been ceded from Massachusetts. This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants, not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend, even in Massachusetts, to all land below high-water mark unless it has been so used, built upon, or occupied as to prevent the passage of boats, and the natural ebb and flow of the tide: Weston v. Sampson, 8 Cush. 347; 54 Am. Dec. 764; Moulton v. Libbey, 37 Me. 472; 59 Am. Dec. 57; Packard v. Ryder, 144 Mass. 440; 59 Am. Rep. 101.

The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and while the rights to shore and upland are not changed, they are carried farther out into the tidal stream, or sea: Engs v. Peckham, 11 R. I. 210, 224; Providence Steam Engine Co. v. Providence etc. S. S. Co., 12 R. I. 348, 355; 34 Am. Rep. 652. Until actual filling out, the public rights exist as before: Gerhard v. Bridge Commrs., 15 R. I. 334.

Shell fisheries are public rights which may be regulated for the public good: State v. Cozzens, 2 R. I. 561; State v. Medbury, 3 R. I. 138; New England Oyster Co. v. McGarvey, 12 R. I. 385; as may also the rights of navigation. In the absence of



any express restriction, any inhabitant may take shellfish anywhere in the waters of the state and on the shores below high-water mark as it exists from time to time. In doing so, he may disturb the soil and dig up the grass or sedge if necessary.

The public right of fishery is paramount to the private right to cut grass or sedge: *Bagott v. Orr*, 2 Bos. & P. 472; *Parker v. Cutler Milldam Co.*, 20 Me. 353; 37 Am. Dec. 56; *Peck v. Lockwood*, 5 Day, 22; *Lakeman v. Burnham*, 7 Gray, 437; *Proctor v. Wells*, 103 Mass. 216; and other Massachusetts cases cited above.

<sup>117</sup> The instructions of the judge before whom the case was tried were erroneous in affirming that it was a trespass in the defendant to disturb the plaintiff's thatch in digging clams.

A new trial must be granted.

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**TIDE WATERS BETWEEN HIGH AND LOW WATER MARK—FEE OF LAND UNDER.**—The title to tide land, between high and low water mark, is in the state, in its sovereign capacity, in trust for the people, for the purposes of navigation and fishery: *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219; *Commonwealth v. Manchester*, 152 Mass. 230; 23 Am. St. Rep. 820; *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; *People v. Kirk*, 162 Ill. 138; 53 Am. St. Rep. 277.

**FISHERIES—SHORES OF TIDE WATER.**—The right of taking shellfish is included in the public right of fishing in tide waters whether such shellfish are imbedded in the soil or lie upon its surface: *Weston v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764; *Packard v. Ryder*, 144 Mass. 440; 59 Am. Rep. 101; monographic note to *People v. Kirk*, 53 Am. St. Rep. 293, discussing title to land covered by tidal and other navigable waters; *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794. The common right of fishery includes fishery of clams, and the right to dig for the same: *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 57; but no one has any exclusive right to dig for clams between high and low water mark on tide waters, and one person is not liable to another person in trespass for digging clams there: *Weston v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764. No one can be deprived of his right to take shellfish from natural beds and tide waters by the unauthorized attempt of a person to appropriate the bed of the waters to his own private use: *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794.

## COLLIER v. JENKS.

[19 RHODE ISLAND, 137.]

**FIXTURES.**—MANURE made on a farm in the usual course of husbandry will pass as incident or appurtenant to the realty under a deed of the whole farm, but it does not pass upon a sale of only a small part of the land, though it happens to be piled upon that part. The rule, as applied to an entire farm, is one of policy, to promote the interests of agriculture, but it has no application when the sale is not of the farm, but only of a small part thereof.

Trespass de bonis asportatis. The case was certified on exceptions.

John W. Hogan, for the plaintiff.

John E. Goldsworthy, for the defendant.

**137** MATTESON, C. J. This is an exception to the decision of the district court of the sixth judicial district in an action of trespass de bonis asportatis for breaking and entering the plaintiff's close and taking and carrying away and converting to the defendant's use a quantity of manure. It was admitted at the trial that the manure, amounting to about nine cords, was made on the farm of the defendant's wife; that it had been hauled out of the barnyard and piled on a lot containing about seven-eighths of an acre, which, subsequently, on December 23, 1893, was conveyed by the defendant and his wife to the plaintiff. The defendant offered evidence tending to prove an oral reservation of the manure at the time of the conveyance and an agreement between him and the plaintiff that he might remove the manure in the following spring. The court excluded the evidence, on the ground that the manure was appurtenant to the land on which it was piled and passed **138** under the deed of it to the plaintiff, and that no oral reservation was effectual to retain title to the manure.

The record shows that no exception was taken at the trial to the exclusion of testimony, and we cannot, therefore, consider that part of the defendant's brief based on exceptions to the exclusion of testimony: *Meyers v. Briggs*, 11 R. I. 180. Exception, however, within the time permitted by the judiciary act was taken to the decision of the court awarding the plaintiff forty-five dollars, the value of the manure. This exception will enable us to review the decision of the court and to set it aside if, on the evidence reported, it is erroneous.

Manure made on the farm in the usual course of husbandry is so far regarded as an incident of the realty or appurtenant

to it that, in the absence of any agreement concerning it, it will pass under a deed of the farm. The rule is one of policy, designed to promote the interests of agriculture. We see no reason for its application when the sale is, not of the farm, but only of a small parcel of land off the farm on which the manure happens to be piled. *Cessante ratione, lex ipsa cessat*. There is nothing in the nature of manure prior to its actual incorporation with the soil which makes it necessary to regard it as a part of the realty. It may be sold by the owner of a farm separately from the land. Such a sale amounts to a severance of it from the land and constitutes it personal estate: *French v. Freeman*, 43 Vt. 94; or it may be the subject of an oral reservation prior to or contemporaneous with a conveyance of the land and thereby become personal estate: *Strong v. Doyle*, 110 Mass. 92. Manure made in livery stables, or in barns not connected with farms, or otherwise than in the usual course of husbandry, forms no part of the realty on which it may be piled, but is regarded as personal estate: *Needham v. Allison*, 24 N. H. 355; *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269; *Lassell v. Reed*, 6 Greenl. 222; *Parsons v. Camp*, 11 Conn. 525.

The conveyance to the plaintiff having been, not of the farm, but only of a lot of seven-eighths of an acre, we are of the opinion that the manure did not form a part of the land conveyed because it happened to be piled on it at the time of <sup>139</sup> the conveyance; and, hence, that the court below erred in awarding the value of the manure to the plaintiff.

Exception sustained and case remitted to the district court of the sixth judicial district for a new trial.

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**FIXTURES—MANURE AS PART OF REALTY.**—As a general rule, manure on a farm at the time it is sold, and made in the ordinary course of husbandry, vests in the vendee. It is a fixture, and passes as an incident to the realty: See extended notes to *Kittredge v. Woods*, 14 Am. Dec. 396-398; *Chase v. Wingate*, 28 Am. Rep. 39, 40, treating of manure as a fixture.



## HUNT, PETITIONER.

[19 RHODE ISLAND, 139.]

**EXECUTORS AND ADMINISTRATORS—PRIMARY FUND FOR PAYMENT OF DEBT SECURED BY MORTGAGE.**—The general rule, as between the real and personal representatives, is, that the personalty is the primary fund for the payment of debts. This rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased, but extends only to encumbrances created by the deceased himself. If the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt, and, on his death, passes to his devisee or heir at law, subject to the encumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt.

**EXECUTORS AND ADMINISTRATORS—PAYMENT OF MORTGAGE OUT OF PERSONAL ESTATE—WHEN NOT JUSTIFIED.**—If one buys an estate subject to a mortgage, and in his deed assumes the payment of the mortgage note, it is equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt, but does not show an intention to make the mortgage debt, as between his real and personal representatives, his personal debt; and, if the mortgagee subsequently transfers the mortgage to a bank, the consideration for the transfer being a written guaranty of payment of the mortgage note, signed on its back by the purchaser of the estate, such guaranty does not show an intention to make the mortgage debt, as between the purchaser's real and personal representatives, his personal debt, as it is merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remains after the guaranty precisely as before. The purchaser's administrator is not, therefore, charged with the payment of the mortgage debt, and he is not justified in paying it out of the personal estate coming into his hands.

Case stated by Horatio A. Hunt, and others, for an opinion of the court.

Joseph C. Ely, for the petitioners.

<sup>139</sup> **MATTESON, C. J.** This is a case stated for the opinion of the court. Rowland L. Rose died intestate September 19, 1894, seised and possessed of a parcel of land on <sup>140</sup> the southwest corner of Bridgham and Greenwich streets in Providence, particularly described in the petition. This parcel of land was formerly owned by Dexter N. Knight, who mortgaged it to the Mechanics' Savings Bank to secure the payment of his note for twenty-five thousand dollars, dated January 23, 1869. On February 13th following, Knight conveyed the equity of redemption in the mortgaged property to Gorham Thurber, who assumed the payment of the mortgage and guaranteed the payment of the mortgage note by guaranty written on its back. The trustees of the estate of Thurber conveyed the property to Rose subject to the mortgage by deed dated May 11, 1889. The

consideration named in this deed was ten thousand dollars, which was the sum paid by Rose for the equity of redemption. He also assumed the payment of the mortgage by a clause in the deed to him as follows: "Said premises are subject to a mortgage of twenty-five thousand dollars (\$25,000) to the Mechanics' Savings Bank, payment of which is assumed by the grantee." On July 22, 1889, the Mechanics' Savings Bank transferred the mortgage to the Citizens' Savings Bank. Rose thereupon as a consideration for the transfer, signed an agreement on the back of the note as follows: "Waiving demand, notice, and protest, I hereby guarantee the full payment of the within note; future payments of principal or of interest in renewal thereof not releasing me as indorser." The interest on the note has been paid to January 23, 1895. The administrator widow, and heirs at law of the deceased have concurred in stating the foregoing facts to obtain the opinion of the court on the question whether the heirs are entitled to have the mortgage paid out of the personal estate in exoneration of the real, or whether the real estate descended to them subject to the encumbrance of the mortgage.

The general rule as between the real and personal representatives is, that the personalty is the primary fund for the payment of debts; and this rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased: *Gould v. Winthrop*, 5 R. I. 321; *Atkinson v. Staigg*, 13 R. I. 725; 2 *Williams on Executors*, 1042. The rule extends, however, only to encumbrances <sup>141</sup> created by the deceased himself; if the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt and on his death passes to his devisee or heir at law subject to the encumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt: *Gould v. Winthrop*, 5 R. I. 321. The question, then, resolves itself into this: Did the deceased, purchasing the equity of redemption, by assuming the payment of the mortgage debt in the manner stated, or by guaranteeing the payment of the note on the transfer of the mortgage from the Mechanics' Savings Bank to the Citizens' Savings Bank, make the mortgage debt, as between his real and personal representatives, his personal debt?

The assumption of the mortgage by Rose was equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt:

Mount v. Van Ness, 33 N. J. Eq. 262, 265. Entering into covenants like these, it is held, does not sufficiently show an intention on the part of the purchaser to transfer the debt from the estate to himself, as between his heir and executor or administrator, to have that effect: Evelyn v. Evelyn, 2 P. Wms. 664; Tweddell v. Tweddell, 2 Brown Ch. 101, 152; Woods v. Huntingford, 3 Ves. 128; Butler v. Butler, 5 Ves. 534; Waring v. Ward, 7 Ves. 332; Earl of Oxford v. Lady Rodney, 14 Ves. 417; Barham v. Earl of Thanet, 3 Mylne & K. 607; Duke of Cumberland v. Codrington, 3 Johns. Ch. 229; 8 Am. Dec. 493; Keyzey's case, 9 Serg. & R. 71, 73; Mount v. Van Ness, 33 N. J. Eq. 262. And the rule is the same even though the purchaser has rendered himself liable at law to the mortgagee for the payment of the mortgage debt: Duke of Cumberland v. Codrington, 3 Johns. Ch. 229; 8 Am. Dec. 492.

Nor was the guaranty on the back of the note by Rose sufficient to manifest an intention on his part to make the debt his own in such wise as to change the natural course of assets. It was merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remained after the guaranty precisely as before.

<sup>142</sup> To have the effect of transferring the debt from the estate on which it is charged to the personal estate, the dealing between the purchaser and the mortgagee must go to the length of changing the terms of the original contract so as virtually to constitute a new contract; as, for instance, arranging for different times or modes of payment, or for an additional loan with a new mortgage including the old as well as the new loan, etc: Billingham v. Walker, 2 Brown Ch. 603; Woods v. Huntingford, 3 Ves. 128; Waring v. Ward, 7 Ves. 332; Earl of Oxford v. Lady Rodney, 14 Ves. 417; Barham v. Earl of Thanet, 3 Mylne & K. 607; Cressy v. Willis, 159 Mass. 249; 2 Jarman on Wills, 1449.

We are, therefore, of the opinion: 1. That the estate described in the petition descended to the heirs at law of Rowland L. Rose charged with the burden of the mortgage for twenty-five thousand dollars; 2. That he did not, by assuming payment of the mortgage, nor by guaranteeing payment of the mortgage note, charge his administrator with the payment of the mortgage debt; 3. That the administrator will not be justified in paying the mortgage debt out of the personal estate which may come to his hands.



**EXECUTORS AND ADMINISTRATORS—PRIMARY FUND FOR PAYMENT OF MORTGAGE DEBT.**—The personal estate of a deceased purchaser of land under mortgage is not liable to exonerate the realty from the charge, unless, by some agreement with the mortgagee, or by directions in his will, he has manifested a clear intention to assume the debt as his own, and to make it payable out of his personalty; and an indemnity given to the mortgagor, coupled with the payment of part of the debt, will not have that effect. If such purchaser, after charging the mortgage upon his personal estate, dies, and his heir, being also his personal representative, afterward dies, the personal assets of the heir are not the primary fund for the payment of the debt: *Cumberland v. Codrington*, 3 Johns. Ch. 220; 8 Am. Dec. 492.

## **AMERICAN NATIONAL BANK v. AMERICAN WOOD PAPER COMPANY.**

[19 RHODE ISLAND, 149.]

**BONDS, COUPON—NEGOTIABILITY OF.**—A coupon bond, issued by a corporation, under seal, and payable to a trust company, or bearer, or, in case of registry, to the registered owner, in ten years after the date thereof, with a reservation of the privilege of paying it at any time after five years, with interest at the rate of six per cent per annum, payable semi-annually, must be treated as a negotiable security.

**BONDS, COUPON—MATURITY OF—HOW AFFECTED BY MORTGAGE CLAUSE MAKING DEBT FALL DUE UPON DEFAULT.**—Although coupon bonds, payable to a trust company, or bearer, are secured by a mortgage given to the company as trustee for the bondholders, which mortgage provides that upon default in the payment of interest, all of the outstanding bonds shall become due and payable, and that the trustee shall foreclose the mortgage by entry or sale, in the manner prescribed therein, such bonds, though they recite that they are secured by the mortgage, do not make the terms of the mortgage a part of the contract so as to give a right of action for the principal of the bonds before maturity, as the mortgage clause, making the debt fall due upon default in the payment of interest, is merely intended to give the trustees a right of action upon the bonds for the foreclosure of the mortgage, and not to give a right of action upon default, independently of foreclosure proceedings.

**NEGOTIABLE INSTRUMENTS—EFFECT OF STATUTES DECLARING WHAT ARE—COUPON BONDS.**—Statutes which declare certain instruments to be negotiable are merely declaratory and remedial, and do not exclude other forms of negotiable paper. Hence, although promissory notes only are declared by statute to be negotiable, a court may hold coupon bonds to be negotiable where they are, in effect, promissory notes, it being clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper.

Action of debt on bond, certified from the common pleas division on a demurrer to the declaration. The plaintiff sued as the purchaser and bearer of certain coupon bonds for one thousand dollars each, issued by the defendant corporation, the

American Wood Paper Company. The bonds were all of the same tenor and date, and were made payable to the Girard Life Insurance, Annuity, and Trust Company, of Philadelphia, or bearer, or, in case of registry, to the registered owner, with a reservation of the privilege of paying the same at any time after five years, with interest at the rate of six per cent per annum, payable semi-annually. Each bond was one of a series of three hundred bonds. They were secured by a mortgage given to the trust company, as trustee for the bondholders, in the sum of three hundred thousand dollars, in which mortgage it was provided that in case of default in the payment of the semi-annual interest at any time for more than six months after demand made, the trustee should foreclose the mortgage by entry or sale upon the written request of the holders of one-third of the amount of outstanding bonds. It was also stated in the mortgage that it was "distinctly understood and agreed" that, in the event of any such default, the whole principal sum of all the bonds then outstanding should forthwith become due and payable. Each bond provided for its registry, and that it might be discharged from registry by transfer to bearer and thereon be transferable by delivery, but that it might be again registered in the owner's name as before. Each bond also provided that its registry should not restrain the negotiability of the coupons by delivery merely, but that the coupons might be surrendered and the interest be made payable to the registered owner, or by order only. The bonds were issued under the corporate seal, and recited that they were secured by the mortgage.

Richard B. Comstock and Rathbone Gardner, for the plaintiff.

Arnold Green and James Tillinghast, for the defendant.

**152** STINESS, J. The plaintiff sues to recover the principal and interest due on certain bonds and coupons issued by the defendant May 1, A. D. 1890, and payable May 1, 1900, or sooner after five years. The bonds are secured by a mortgage of all the defendant's property, in the state of Pennsylvania, given to a trustee for the bondholders, in which it is provided that in case of default in the payment of interest for more than six months, the principal of said bonds shall be due and payable. The declaration sets out the bonds and mortgage, profert of which is made, and alleges default in payment of interest for more than six months after demand made therefor. The defendant demurs to the declaration upon several grounds;

but the two grounds pressed in the argument are, that the bonds are not negotiable so as to give the plaintiff a right of action in its own name, and that the terms of the mortgage cannot be imported into the bonds so as to give a right of action for the principal thereof before maturity.

We think that the bonds must be treated as negotiable securities. While there has been some diversity of opinion upon this subject, the tendency of recent decisions and the weight of authority and reason seem now to be in favor of negotiability. At first, before such bonds had become common, courts naturally held that they lacked the technical and established characteristics of negotiable instruments. Thus, in *Crouch v. Credit Foncier* (1873), L. R. 8 Q. B. 374, it was held that the contract embodied in similar bonds prevented them from being promissory notes, even if they had been without a seal, and that the custom to treat them as negotiable, being of recent origin, could not attach an incident <sup>153</sup> to a contract contrary to the general law. But in *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, the court, by Cockburn, C. J., does not concur in thinking the latter ground conclusive. In the recent case of *Venables v. Baring* (1892), L. R. 3 Ch. Div. 527, American railroad bonds, upon the evidence of an American lawyer as to their negotiability in this country were held to have acquired in England, in the city of London, among English merchants, the character of negotiability. Notwithstanding the limitations of this decision we think it may be taken as practically settling the rule in England: See, also, *In re Imperial Land Co.*, L. R. 11 Eq. Cas. 478. In this country, the decisions have been quite explicit. The principle on which they rest was well stated by Mr. Justice Grier, in *Mercer County v. Hacket* (1863), 1 Wall. 83, as follows:

"This species of bonds is a modern invention, intended to pass by manual delivery and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts of common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may



have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world and have received <sup>154</sup> the sanctions of judicial recognition, not only in this court (*White v. Vermont etc. R. R. Co.*, 21 How. 575), but of nearly every state in the Union, is well known and admitted."

After this strong statement it is needless to say more, except to refer to a few cases to the same effect: *Kneeland v. Lawrence*, 140 U. S. 209; *Chicago Ry. etc. Co. v. Merchants' Bank*, 136 U. S. 268; *De Hass v. Roberts*, 59 Fed. Rep. 853; *Reid v. Bank of Mobile*, 70 Ala. 199; *National Exchange Bank v. Hartford etc. R. R. Co.*, 8 R. I. 375; 91 Am. Dec. 237; 5 Am. Rep. 582; 1 Randolph on Commercial Paper, sec. 74, note 1, and cases cited. It is true that some states have statutes which declare bonds of this kind to be negotiable (see 2 Am. & Eng. Ency. of Law, 319) and the point is taken that it is not so in this state, since the Public Statutes of Rhode Island, chapter 142, sections 6, 7, relate only to promissory notes. We do not think, however, that this fact prevents us from holding these bonds to be negotiable. Such statutes are declaratory and remedial, and are evidently not intended to exclude other forms of negotiable paper. Bonds of this sort are clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper, and the bonds in effect are promissory notes. The special provisions contained therein are not such as to deprive them of their fundamental character of a promise to pay at a certain time. These bonds are not given as collateral to a note secured by mortgage, but the mortgage is security for the bonds themselves: *Riker v. Sprague Mfg. Co.*, 14 R. I. 402; 51 Am. Rep. 413. See *Costello v. Crowell*, 127 Mass. 293; 34 Am. Rep. 367; 134 Mass. 280.

Upon the questions of importing the terms of the mortgage into the contract, so as to give a present right of action for the principal, we think the objection is well taken. The bonds

do not make the terms of the mortgage a part of the contract. They simply recite that they are secured by a mortgage. Turning to the mortgage, we find that, in case of default, one-third of the bondholders, in amount, may require the trustee to sell the property and in the same clause occurs the provision that the bonds shall forthwith become due and payable upon the default. We think that this is <sup>155</sup> a provision only for the purposes of foreclosure by entry or sale. If one-third, in amount, of the bondholders is required for a sale, out of the proceeds of which the principal is to be paid, it would be quite incompatible with this limitation to hold that a single bondholder could precipitate the maturity of the bonds by a suit. When one is due all are due, and the provision implies that the large majority may think it best not to foreclose at once, and, if so, the right to give time is secured in this provision. It is a provision for a special purpose and not intended to give a right of action upon default, independently of foreclosure proceedings. Such is the construction given to similar provisions in *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42; *White v. Miller*, 52 Minn. 367; *McClelland v. Bishop*, 42 Ohio St. 113; *Mallory v. West Shore etc. R. R. Co.*, 3 Jones & S. 174.

Of the cases cited by the plaintiff to sustain the point that the bonds and mortgage, being connected and contemporaneous, are to be construed together, nearly all are suits for foreclosure, or actions for a balance due after foreclosure. This is a very different matter. Clearly, after such an agreement, the obligation may be treated as due for the purpose of foreclosure, and the maker of the note or bond would be liable for the balance remaining due, in some form of action, but whether upon the note or the covenant we are not now called upon to say. Such a liability, however, does not give the right of action which is claimed in this case. *Venables v. Baring*, L. R. 3 Ch. Div. 527, was a suit to establish a title. *First Nat. Bank v. Peck*, 8 Kan. 660, and *Chambers v. Marks*, 93 Ala. 412, are in favor of the plaintiff's claim, but we think that the weight of authority, the purpose of the provision, and the reason on which its construction depends are against it.

Our conclusion is, that the demurrer to the negotiability of the bonds must be overruled and the demurrer to the statements of the plaintiff's present right of action must be sustained.

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CORPORATE COUPON BONDS payable to a person named, or order, or bearer, are treated as negotiable instruments. If payable

to bearer, they are transferable by delivery so as to confer a complete title upon the possessor, not as instruments negotiable under the law merchant, but as instruments of a peculiar character expressly designed to be passed from hand to hand, and by common usage actually so transferred: *Note to Trustees of Internal etc. Fund v. Lewis*, 43 Am. St. Rep. 213. A negotiable instrument, payable in the future, cannot be brought to immediate maturity by a clause in a mortgage given to secure it, authorizing the mortgagee to declare the debt due upon default in any of the provisions found in the mortgage: *White v. Miller*, 52 Minn. 367.

## SWEENEY v. METROPOLITAN LIFE INSURANCE CO.

[19 RHODE ISLAND, 171.]

**INSURANCE, LIFE—ANSWERS IN APPLICATION—WARRANTIES.**—If an applicant for a policy of life insurance warrants, in his application, that the representations and answers made by him therein are true, agreeing that any untrue answer shall render the policy void, and the policy makes the answers and statements in the application a part of the contract of insurance, the applicant's answers relative to hemorrhages and the extent of his use of intoxicating liquors, are warranties.

**INSURANCE, LIFE—WARRANTIES—BURDEN OF PROVING TRUTH OF.**—If it is expressly covenanted, in an application for a policy of life insurance, as a condition of liability, that the statements and declarations made in the application are true, and the truth of such statements forms the basis of the contract, the policy making the answers and statements in the application a part of the contract, the burden of proving their truth, in an action on the policy, rests upon the plaintiff, on the principle that a party cannot recover upon a conditional contract until he shows that he has complied with the conditions.

**INSURANCE, LIFE—WARRANTIES—PROVING TRUTH OF—SHIFTING BURDEN.**—The burden of proving the truth of a warranty, in a policy of insurance, cannot be shifted from the plaintiff by a rule of evidence which, in many instances, permits a prima facie case to be made out by presumption, until something is shown to rebut it. Such a rule is merely one of convenience, made to facilitate the trial of causes, and to prevent undue hardship, as, in cases where some of the answers, in an application for an insurance policy, are not in dispute, or relate to matters which were peculiarly within the knowledge of a deceased applicant.

Action by Catherine Sweeney, administratrix, upon a policy of insurance. The defendant petitioned for a new trial.

Samuel R. Honey, J. Stacy Brown, and Frank F. Nolan, for the plaintiff.

Andrew J. Jennings, James M. Morton, Jr., and Michael W. Callaghan, for the defendant.

**171 STINESS, J.** By the terms of the policies of insurance issued by the defendant, the answers and statements in the



printed and written applications for the policies are made a part of the contract; the applicant declares and warrants that the representations and answers made are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance, if any be issued, and that any untrue answer will render the policy void.

Whether statements which obviously cannot lie within the knowledge of the applicant, and which both parties must know are to be given upon information and belief, must be <sup>172</sup> taken to be warranties is a question which we need not decide; but that the above provisions constitute a warranty of the truth of the statements in the application, so far as they rest upon the applicant's own knowledge, is beyond question: *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141; *Lyons v. Providence Washington Ins. Co.*, 14 R. I. 109; 51 Am. Rep. 364; *Jerrett v. John Hancock etc. Ins. Co.*, 18 R. I. 754; *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82; *Cobb v. Covenant etc. Co.*, 153 Mass. 176; 25 Am. St. Rep. 619; *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587; 60 Am. Rep. 661. Without multiplying citations, we quote the language of Mr. Justice Hunt in *Jeffries v. Life Ins. Co.*, 22 Wall. 47: "Many cases may be found which hold that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract."

The statements in question in this case being warranties, we are called upon to decide whether the trial judge correctly charged the jury that the burden of proof was upon the defendant to show the falsity of any answer set up in defense. There are many cases which lay down this rule, upon the principle that the burden of proving an issue is upon the party who raises it: *Spencer v. Citizens' etc. Ins. Assn.*, 142 N. Y. 505; *Russell v. Fidelity Fire Ins. Co.*, 84 Iowa, 93; *Sutherland v. Standard etc. Ins. Co.*, 87 Iowa, 505; *Continental Fire Ins. Co. v. Rogers*, 119 Ill. 474; 59 Am. Rep. 810. *Mowry v. Home Life Ins. Co.*, 9 R. I. 346, appears to be to the same effect, but that case related to the value of the plaintiff's insurable interest in the life of an uncle for which he had taken a policy. The charge to the jury was, that

the plaintiff must show that he had an insurable interest in the life of his uncle, but, as the value of such interest was a matter of opinion and estimate, the <sup>173</sup> burden was on the defendant to show that the alleged indebtedness and business relations out of which the interest sprung were no foundation for the estimate of the plaintiff and the large amount of insurance obtained.

Cases like those cited above rest upon a correct principle when it is applied to defenses set up outside of the terms of the contract. But they leave out of view another equally correct and more pertinent principle that a party cannot recover upon a conditional contract until he shows that he has complied with the conditions. To depart from this principle would be to make a new contract for the parties. The rule of law is well stated by Ames, C. J., in *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159, as follows: "It is clear, however, upon principle, to use the words of Mr. Justice Washington, in *Craig v. United States Ins. Co.*, 1 Pet. C. C. 410, that where the assured has entered into a warranty, he cannot recover against the underwriters 'without first averring and proving performance of these stipulations': And see 2 Phillips on Insurance, 2d ed., 753; 2 Arnould on Insurance, 1235, 1262. The burden of proving the performance of all warranties made by him rests upon the assured; and although this burden may be lifted by presumption merely, as in case of the implied warranty of seaworthiness it is held to be, yet this cannot shift the burden, which remains, notwithstanding the prima facie case thus made out by the plaintiff, where the law first casts it, to the end of the trial." We think that this case lays down the correct rule. It is the rule which applies to all contracts, and a policy of insurance is a contract. Rules of evidence, however, involving only the mode of procedure in a case must be largely within the discretion of the court, in order to be practicable and so, many things are allowed to go by presumption, or with slight proof, to make a prima facie case, until something appears to controvert it. But this rule of convenience does not relieve a party from any of the obligations of his contract. Thus, it has become common in suits on promissory notes simply to produce the note to make out a prima facie case; the presumption of signature, consideration, and other incidents following. <sup>174</sup> The same presumptions are usually admitted with reference to a deed, and other like cases are readily conceived. When a man solemnly executes a paper upon which he is to base a contract, there is a natural presumption that what he

says in it is true, in the absence of anything to contradict it. Rules of evidence are made to facilitate the trial of cases and not to render a trial impossible, and many of the answers required, which lie peculiarly within the knowledge of the applicant himself, it would be unduly burdensome, if not quite impossible, for another to prove, after the applicant is dead. Some relate to ancestors and relatives, their ages and diseases; others to his own diseases, from childhood up. Now while some of these, at any rate, may be warranties, it would be a great hardship to require full evidence of the truth of every answer, affirmative and negative, when many of them may not be in dispute at all. They may be sustained *prima facie* by the presumption of truth which attaches to a man's solemn acts and declarations in the course of a contract. "On the other hand," said Mr. Justice Miller, in *Piedmont etc. Life Ins. Co. v. Ewing*, 92 U. S. 377, "it is no hardship that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest; and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded." This states a reasonable rule of procedure. The plaintiff must prove certain essential facts, like the issue of the policy, payment of premiums, death of the assured, notice as required, and the general performance of conditions; but to say, because answers are warranties, that the truth of every one must be proved by witnesses before recovery, as claimed by the defendant, would be manifestly unreasonable. Judge Miller pertinently asks, How can it be proved that a man who has lived forty or fifty years has never had dyspepsia or diarrhoea? In the case just cited, he also said that the answers were warranties, but that the burden of proving them to be false was upon the defendant. We cannot agree with the last <sup>175</sup> proposition. Notwithstanding our high respect for his decisions, we prefer his reasoning to his conclusion.

Judge Gray said, in *McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129: "The nature and form of the warranty may affect the amount of evidence to be required of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proved by the plaintiff in order to maintain an action on the policy."

Properly analyzed, *Mowry v. Home Life Ins. Co.*, 9 R. I. 346,



is not opposed to the view which we have taken. The charge of the trial judge, which was sustained, laid down the rule that the plaintiff must show that he had an insurable interest in the life of his uncle; that this would not be sustained by showing claims which were a mere pretext for insurance; but as the value of the interest was a matter of estimate and opinion (which could not, therefore, have been understood by the company to be an absolute statement), the burden of showing that his estimate was fraudulent was upon the defendant.

While we are aware that there are many cases, as we have said above, which put the burden of proving the falsity of a warranty in insurance cases upon the defendant, we cannot follow them, because we believe such a rule to be contrary to the well-established law in regard to warranties in other cases. Doubtless, in some of them, confusion has arisen from the rule in regard to warranties of quality, etc., in cases of the sale of property. But, as pointed out by Shaw, C. J., in *Dorr v. Fisher*, 1 Cush. 271, this is a collateral stipulation, which does not prevent the vesting of title nor the right to sue for the purchase money, because the contract is completed. The purchaser can sue for a breach of the warranty, and the burden would be upon him. To avoid circuitry of action he is allowed to set up in defense under the same burden. But this rule does not apply to a warranty which is made a part of the contract: *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159. To put the burden on the defendant practically reduces the warranty to a representation and so <sup>176</sup> modifies the contract of the parties. However much a court may disapprove of the form of a contract, it has no right to change it. In other cases, the rule has doubtless been stated with the same meaning which we have indicated above, viz., that the defendant must first offer proof of the falsity of answers which are attacked: See *Crowninshield v. Crowninshield*, 2 Gray, 524.

Our conclusion is, that the answers in the application are to be taken as warranties; that the burden of proving their truth rests upon the plaintiff, and that this burden may be lifted, not shifted, as to matters which only remotely affect the right of action, by the presumption in favor of honesty and against fraud, until something appears to rebut it.

The answers objected to in this case related to the extent of use of intoxicating liquors by the deceased and to hemorrhages. The burden is upon the plaintiff to prove their truth, if they are attacked, and as the jury were instructed to the contrary a new trial must be granted.

**LIFE INSURANCE—ANSWERS IN APPLICATION—WARRANTIES—BURDEN OF PROOF.**—If the application for insurance on a person's life is expressly declared to be a part of the policy, and the statements therein are warranted to be true, there can be no recovery on the policy if the statements are shown to be false: *Notes to Mutual Life Ins. Co. v. Simpson*, 53 Am. St. Rep. 762; *Ward v. Metropolitan Life Ins. Co.*, 50 Am. St. Rep. 86; *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 635; especially if the insured has stipulated that his policy is to be void if the statements made by him are untrue: *Note to Ward v. Metropolitan Life Ins. Co.*, 50 Am. St. Rep. 86. Answers, in an application for a policy of life insurance, respecting specific ailments, are warranties: *Mutual Life Ins. Co. v. Simpson*, 58 Tex. 333; 53 Am. St. Rep. 757.

**INSURANCE—WARRANTIES—BURDEN OF PROOF.**—An express warranty in an insurance policy is a condition precedent, and the burden of proving performance rests upon the insured: *McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472; 97 Am. Dec. 116; 1 Am. Rep. 129. *Contra, Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495; 58 Am. St. Rep. 549.

## IRELAND v. GLOBE MILLING AND REDUCTION Co.

[19 RHODE ISLAND, 180.]

**ATTACHMENT—STOCK IN FOREIGN CORPORATION—NONRESIDENT OWNER.**—Shares of stock in a foreign corporation owned by a nonresident defendant cannot be reached by attachment in this state, although the officers of the corporation are within the state and its business is being carried on here.

**ATTACHMENT—CORPORATE STOCK—SITUS.**—The situs of corporate stock, for the purposes of attachment and execution, is the domicile of the corporation, and that place only, which is within the state creating it.

**CORPORATIONS—RESIDENCE OF.**—A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although by comity it may be allowed to do business, through its officers and agents, in other jurisdictions.

**ATTACHMENT—CORPORATE STOCK—CONSTRUCTION OF STATUTE.**—A statute which authorizes "the attachment of the shares of the defendant in any corporation," etc., is to be construed in view of the fundamental principle that property is not subject to attachment unless it is actually or constructively within the jurisdiction of the court issuing the attachment.

**CORPORATIONS—BY-LAWS—LIMITATION UPON ENACTMENT OF.**—If power is conferred upon a corporation, by the provisions of a particular charter, or by a general statute, to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication.

**CORPORATIONS—UNAUTHORIZED BY-LAW RESTRICTING SALE OF STOCK.**—A corporation having statutory authority to enact by-laws, to determine the manner of calling and conducting meetings, the number of members that constitute a quorum, the number of votes to be given by the shareholders, the mode of voting by proxy and of selling shares for neglect to pay assessments, is not empowered to enact a by-law providing that no stockholder shall sell

his stock to any person unless he shall first offer the same to the corporation at the lowest price for which he is willing to sell it.

Assumpsit for refusing to transfer stock, heard on demurrers to the pleas and replications.

William H. Sweetland, for the plaintiff.

Warren R. Perce, for the defendant.

<sup>180</sup> TILLINGHAST, J. The pleadings in this case present two questions for our decision, namely: 1. Is the stock of a non-resident, in a foreign corporation, doing <sup>181</sup> business in this state, attachable here; and 2. Are the by-laws of the defendant corporation set up in its third special plea in bar, taken in connection with the statutes of the state of Maine relating to the transfer of stock in corporations, which are also pleaded, effectual to prevent William R. Stearns, the assignor of the stock in question, from transferring the same to the plaintiff by a mere indorsement and delivery thereof, so as to confer upon him the right to maintain this action.

The first and second pleas set up as an excuse for the refusal of said defendant corporation to transfer said stock the fact that, at the time of the making of the request by the plaintiff for said transfer, the stock was under two attachments as the property of said Stearns, and hence that it could not safely transfer the same. The third plea sets up that the defendant corporation was organized August 10, 1892, under the laws of the state of Maine, at Saco, by articles of agreement or association, to which articles said Stearns was a subscribing party, and that in the proceedings of organization he participated and was then and there elected president and a director of said corporation, which offices he filled during the ensuing year; and that then and there as a part of the proceedings of the organization of said company, certain by-laws were unanimously adopted by said Stearns and the other incorporators of the company in relation to the transfer of stock and other matters, among which by-laws were the following:

“Article III.—Capital Stock.

“Sec. 2. No stockholder shall assign and transfer his stock, or any part thereof, to any person, unless he shall first offer the same to the corporation at the lowest price at which he is willing to sell and assign the same. If, in thirty days, after such offer shall have been made in writing to the corporation, said corporation shall refuse or neglect to purchase the stock so offered,



the owner thereof may sell and transfer the same to any other person at not less than the price stated in said offer.

<sup>182</sup> "Sec. 3. Shares may be transferred by indorsement on the certificates of stock and delivery thereof, but shall not be valid (except between the parties thereto) until the same shall be recorded in proper form upon the books of the corporation. Upon surrender, a new certificate or certificates shall be issued, and the surrendered certificate or certificates shall be canceled and replaced and secured in the certificate-book."

Said third plea then proceeds to state that said by-laws had been adopted and were in force at the time, and before the time when the certificates of stock mentioned and described in the declaration, or any certificate of stock in the said corporation, had been issued, and that all said certificates were and are subject to said by-laws and the provisions thereof, which by-laws from their adoption till now, have been continuously in force, of which by-laws and the operation thereof said Stearns and said plaintiff, at and before the sale set out in plaintiff's declaration had knowledge; that said Stearns had not before the alleged sale offered to said corporation his said stock at any price whatever, nor had in any manner complied with the by-laws concerning the transfer of his said stock, of which noncompliance with said by-laws by said Stearns the plaintiff had knowledge at the time of and before said sale; wherefore, the defendant, having said lien of option upon said stock by reason of said by-law, declined to register said transfer of said stock, because said Stearns had as aforesaid failed to comply with said by-law relating to said transfers. Said plea, as amended by agreement of the parties since the hearing of the case, also sets up the statutes of the state of Maine in force at the time of the organization of the defendant corporation, relating to the organization and management of corporations, viz., chapter 48, sections 16-19.

<sup>183</sup> As to the first question: We think it is well settled that shares of stock owned by a nonresident defendant in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the state and the business of the corporation is being carried on here. The situs of the stock for the purposes of attachment and execution is the domicile of the corporation, and that place only: See Cook on Stock and Stockholders, 3d ed., sec. 485, and cases cited; *Plimpton v. Bigelow*, <sup>184</sup> 93 N. Y. 592; 23 Am. & Eng. Ency. of Law, 632, and cases cited; *Winslow v. Fletcher*, 53 Conn. 390; 55 Am. Rep. 122.

A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although, by comity, it may be allowed to do business, through its officers and agents, in other jurisdictions: *Chaffee v. Fourth Nat. Bank*, 71 Me. 514; 36 Am. Rep. 345.

Our statute which authorizes "the attachment of the shares of the defendant in any corporation," etc. (Judiciary Act, c. 33, sec. 20), "is to be construed," as said by the court in *Plimpton v. Bigelow*, 93 N. Y. 592, concerning a similar statute of New York, "in view of the fundamental principle upon which all attachment proceedings rest, that the res must be actually or constructively within the jurisdiction of the court issuing the attachment in order to any valid or effectual seizure under the process": See, also, *Taft v. Mills*, 5 R. I. 393. In the case at bar, the stock in question was neither actually nor constructively in this state at the time of the attempted attachment thereof, and hence the proceeding was a nullity. And this statement is equally applicable to the attempted proceeding by trustee process or garnishment set out in the pleadings, as to the said attachment proceeding; although we do not wish to be understood as intimating that shares of stock in a corporation can be reached in this way. In this connection see *Lowell on Transfer of Stock*, sec. 9, and cases cited.

As to the second question: We do not think the defendant corporation had power to enact the by-law first above quoted. Section 6 of chapter 46 of the statutes of Maine, set up in the defendant's third special plea, provides that: "Corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by the shareholders; the tenure of office of the several officers; the mode of voting by proxy, and of selling shares for neglect to pay assessments: and may enforce such by-laws by penalties not exceeding twenty dollars." And the rule is that where, by the provisions of the particular charter, or by <sup>185</sup> a general statute relating to corporations, power is conferred upon a corporation to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication. "*Expressio unius est exclusio alterius*": See *Angell and Ames on Corporations*, 5th ed., sec. 325; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Chouteau Spring Co. v. Harris*, 20 Mo. 382. The defend-

ant corporation, then having no power to enact the by-law in question, it becomes unnecessary to consider whether or not it was a reasonable enactment, as contended by defendant's counsel.

The defendant's demurrers to plaintiff's replications to the first and second pleas are overruled, and said replications are sustained, and the plaintiff's demurrer to the defendant's third plea is sustained and the plea overruled, and the case remitted to the common pleas division for further proceedings.

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**ATTACHMENT—JURISDICTION.**—To subject property to attachment or garnishment it must be within the jurisdiction of the court: *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522, and note; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448.

**ATTACHMENT OF STOCK IN FOREIGN CORPORATION—NONRESIDENT OWNER.**—The stock of a corporation formed in one state, but existing as a domestic corporation in another state, is subject to attachment in the latter state, against a nonresident owner, although the certificates are in his possession beyond the limits of the state: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752. The attachment of stock of a foreign corporation is not possible in Missouri: *Armour etc. Banking Co. v. St. Louis etc. Nat. Bank*, 113 Mo. 12; 35 Am. St. Rep. 691. See, also, *Winslow v. Fletcher*, 53 Conn. 390; 55 Am. Rep. 122. See *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448, and note, as to garnishment of foreign corporations.

**CORPORATIONS—DOMICILE—SITUS.**—A corporation has its domicile in the state from which it derives its existence: *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917; *Combes v. Keyes*, 89 Wis. 297; 46 Am. St. Rep. 839; *Duke v. Taylor*, 37 Fla. 64; 53 Am. St. Rep. 232; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448. The situs of a corporation determines the situs of its stock, without regard to the locality of the stock certificates: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752.

**CORPORATIONS—BY-LAWS—POWER TO ENACT.**—In the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication: See monographic note to *Sayre v. Louisville etc. Assn.*, 85 Am. Dec. 618, on what by-laws a private corporation aggregate may adopt. The powers of a corporation being derived from the law, no by-law can abridge or enlarge those powers: See monographic note to *People's etc. Sav. Bank v. Superior Court*, 43 Am. St. Rep. 154, showing limitations on the power of private corporations to enact by-laws. In the absence of any restrictions in the articles of incorporation, the directors of a corporation cannot prevent a transfer of shares of stock. The effect of charter provisions, or the provisions of by-laws, requiring a stockholder, in case he wishes to transfer his stock, to offer it to the directors is discussed in the monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 383, discussing to what extent transfers of stock may be restricted: See, also, *Bank of Atchison Co. v. Durfee*, 118 Mo. 431; 40 Am. St. Rep. 396.



**TEFFT v. PROVIDENCE WASHINGTON INSURANCE CO.**

[19 RHODE ISLAND, 1:5.]

**INSURANCE CEASES, WHEN—EFFECT OF WORD “ATTACHED” IN FORFEITURE CLAUSE.**—The word “attached” in a forfeiture clause of an insurance policy on a dwelling-house and barn, providing that the insurance shall cease “if the property hereby insured shall be mortgaged, levied on, or attached, or taken into possession or custody under any proceeding at law or equity, or change takes place in title or possession,” has special reference to personal property, and the insurance on the house and barn, though attachments have been levied on the property, does not cease until title to the land has been divested by a sale on execution prior to a loss.

Assumpsit on a policy of fire insurance. There was a verdict directed for the defendant, and the plaintiffs, Tefft and others, petitioned for a new trial.

Albert D. Bean, for the plaintiffs.

William G. Roelker, for the defendant.

<sup>185</sup> **MATTESON, C. J.** This is assumpsit on a policy of fire insurance issued by the defendant on a dwelling-house and barn situated in Wyoming, in the town of Hopkinton, in this state. The policy contains a clause as follows: “If the property hereby insured shall be mortgaged, <sup>186</sup> levied on or attached, or taken into possession or custody under any proceeding at law or equity, or change takes place in title or possession, or if the building or any part thereof insured, or containing the property insured, shall fall except as a result of fire, all insurance by this policy shall thereby cease.” The dwelling-house mentioned in the policy was destroyed by fire during the term covered by the policy, but prior to its destruction four attachments had been put on the property. None of the suits in which these attachments were made, however, proceeded to the levy of execution and sale of the property. At the trial in the common pleas division, the jury, on the defendant’s motion, were directed to return a verdict in its favor, on the ground that the policy was avoided by the attachments in consequence of the provision in the clause quoted. The plaintiffs excepted to the ruling directing the verdict, and petition for a new trial, alleging that the ruling was erroneous. The question that is raised for consideration is, What effect is to be given to the word “attached”? Does it apply to attachments of real estate?

We find no case in which a similar clause of forfeiture has contained the word “attached.” We find several in which the

rest of the language immediately associated with this word, viz., "levied on or taken into possession or custody," has been considered. It is held that these words were intended to have special, if not exclusive, reference to personal property, the policies containing the clause being adapted to insurance of both real and personal property; that as, when personal property is levied upon, there is usually an actual seizure of it by the officer in whose custody it remains until the sale, the phrase was designed to guard against any supposed increase of risk resulting from a change of possession, and hence that it has no application to a technical levy of execution on real estate, which is unattended by any change in the possession of the property, but consists merely of a mental determination of the officer to make the sale on the execution, followed by a notification of the sale and sale as prescribed by statute: *Commonwealth Ins. Co. v. Berger*, 187 42 Pa. St. 285; 82 Am. Dec. 504; *Insurance Co. v. O'Maley*, 82 Pa. St. 400; 22 Am. Rep. 769; *Smith v. Farmers' etc. Mut. Fire Ins. Co.*, 89 Pa. St. 287; *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; 41 Am. Rep. 1; *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595; *Caraher v. Springfield etc. Ins. Co.*, 63 Hun, 82; *Lynch v. Earle*, 18 R. I. 531; 1 May on Insurance, sec. 274.

This being the construction and the reason for it given to the words "levied on or taken into possession or custody," we do not see that the insertion of the words "or attached," after the words "levied on," add anything to the meaning of the phrase, or serve any purpose except to clear up a doubt which possibly might arise of its application to the case of an attachment of personal property on a writ; the word "levy" being more commonly used to define the seizure of property on execution than on a writ by attachment, though we not infrequently speak of the levy of an attachment.

In the attachment of real estate, the custody or possession of the property is not changed. The attachment merely creates a lien upon the land which can be perfected within the period limited by statute, in the event that judgment is obtained, by a sale of the property on execution. It is not until title to the land has been divested by a sale on execution that the insurance ceases, and this by virtue of the subsequent language in the clause relating to a change in title or possession: *Wood v. American Fire Ins. Co.*, 78 Hun, 109; *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; 41 Am. Rep. 1.

We are of the opinion that the ruling directing the verdict was erroneous, and we therefore grant the petition and remit the case to the common pleas division for a new trial.

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**INSURANCE—CONDITION AGAINST CHANGE OF POSSESSION—ATTACHMENT.**—A condition against change of possession by legal process is broken when an officer takes possession of the property by virtue of a writ of attachment issued according to law, even though it afterward appears that there was no ground for issuing such writ: *Carey v. German-American Ins. Co.*, 84 Wis. 80; 36 Am. St. Rep. 907. It seems that a condition avoiding a policy in case the property "shall be levied on or taken into possession or custody under any proceeding in law or equity" has special reference to personal property; and that a mere levy on execution on real property does not cause the risk to cease or terminate: *Insurance Co. v. O'Maley*, 82 Pa. St. 400; 22 Am. Rep. 769. Compare *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285; 82 Am. Dec. 504; *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; 41 Am. Rep. 1.

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## CADY v. SCHULTZ.

[19 RHODE' ISLAND, 193.]

**TRADEMARKS—TRADE NAME—SIGNS.**—One can have no property in the shape, size, color, or arrangement of signs relative to his business without regard to the letters which they bear.

**TRADEMARKS—TRADE NAME—PHRASE AS TO DENTISTRY.**—No one has a right to any exclusive use, on signs, of the words, "Scientific dentistry at moderate prices."

**TRADEMARKS—TRADE NAMES—DISTINCTION.**—A trademark is a symbol arbitrarily selected by a manufacturer or dealer, and attached to his wares to indicate that they are his goods, but a trade name is descriptive of the manufacturer or dealer himself. No one else can use his trademark, even innocently, but one may use the same trade name as another, if he does not deceive the public and induce customers to mistake one for the other, in which case the fraudulent use of the name may be enjoined.

**TRADEMARKS—TRADE NAME—"U. S."—"U. S. DENTAL ROOMS"—INJUNCTION.**—If a dentist of several years' practice has used, as a trade name, the words, "United States Dental Association," and has displayed this name, or an abbreviation of it, upon signs at his place of business in a certain city within the state, and in advertisements and cards widely distributed through that city and others in the vicinity, and has branch offices in charge of assistants at places without the state, the use of the words, "U. S. Dental Rooms," and the use of the letters, "U. S.," upon the office windows of another person who has opened a dentist's office near the city in which the former has his main place of business, is a plain attempt to convey the idea that the business carried on there is a branch of the former's business, and should be restrained by injunction.

Bill in equity for an injunction.

Clarence A. Aldrich, for the complainant.

Isaac H. Southwick, Jr., for the respondent.



<sup>193</sup> DOUGLAS, J. The complainant is engaged in the practice of dentistry, having offices and rooms for that purpose in Providence, in this state, in Baltimore, Maryland, and in Washington in the District of Columbia, and employing assistants to attend to patients at these places. In the prosecution of this business for four years or more he has used as a trade name the words "United States Dental Association," and has displayed this name, or abbreviations of it, upon signs affixed to his place of business in Providence, and in advertisements and cards widely distributed through Providence, Pawtucket and Attleboro', so that the business of which he is proprietor has become known in the city of Providence and in the adjacent city of Pawtucket by that name.

The defendant, who is likewise a dentist, formerly had an office in Providence near the complainant's rooms, and about December 1, 1894, removed to Pawtucket and opened an office there, and displayed upon his windows and upon the walls of the building signs in close imitation in size, shape, and color, of those used by the complainant. We have no <sup>194</sup> doubt from the evidence that these imitations were intentional. Indeed, this is not denied, and we can conceive of no motive for the use of these similar signs except to take advantage of the advertisements of the complainant, and to induce customers to patronize the defendant. The complainant presents instances where customers were actually misled by them; and the defendant says that people have come into his office supposing it to be controlled by the United States Dental Association, though he asserts that in all cases he has undeceived them.

The complainant particularly urges that the use of the words "U. S. Dental Rooms," as displayed upon the defendant's signs, and the letters "U. S." painted upon the defendant's windows in the same color, size, and shape as the same letters are shown upon the complainant's windows, is an illegal use of these words and letters, and the defendant should be restrained from so employing them. He also claims that he is the inventor of the phrase, "Scientific dentistry at moderate prices," and that defendant cannot lawfully display this legend on his signs, and generally he asks that the defendant may be enjoined from using similar signs to those he uses.

We are of the opinion that the complainant can have no property in the shape, size, color, or arrangement of signs, without regard to the letters which they bear, nor can he claim any

exclusive use of the words "scientific dentistry at moderate prices." The characteristics of the signs do not differ from those which ordinarily appear on business signs placed as these are. The statement that a dentist does his work scientifically and charges moderate prices for it is one which any dentist may make and disseminate if he can do so truthfully. It ought not to be inapplicable equally to all members of the profession. Neither of these things tends to injure unlawfully the complainant's business.

But we think the use of the words "U. S. Dental Rooms," and the use of the letters "U. S." upon the windows of the defendant's office, is a plain attempt to convey the idea that the business carried on there is a branch of the complainant's business and should be restrained.

The argument of the defendant has been directed to the <sup>195</sup> point that the name adopted by the plaintiff lacks the elements of a lawful trademark. It consists of a geographical name coupled with a descriptive term of wide application, and no doubt the defendant is right in contending that such a name is objectionable if intended to be used as a trademark. It would be almost impossible to use the name of the United States within the limits of the country itself so as to divest it of territorial significance, and make it a mere fancy mark.

But the argument ignores certain discriminations which should be made in discussing cases of this character. A trademark is a symbol arbitrarily selected by a manufacturer or dealer, and attached to his wares to indicate that they are his wares. In selecting such a device, he must avoid words merely descriptive of the article or its qualities or such as have become so by use in connection with known articles of commerce. He must also avoid words, e. g., geographical names, which are descriptive of the local origin of the goods, if other persons have the right to deal in goods of a similar origin. When it has become generally known in the trade that this symbol or word has been taken by one dealer or manufacturer to indicate his goods, he acquires a title to it for that purpose, and no one else can use it even innocently. A trade name is of a different character. It is descriptive of the manufacturer or dealer himself as much as his own name is, and frequently, like the names of business corporations, includes the name of the place where the business is located. If attached to goods, it is designed to say plainly what a trademark only indicates by asso-

ciation and use. The employment of such a name is subject to the same rules which apply to the use of one's own name of birth or baptism. Two persons may bear the same name and each may use it in his business, but not so as to deceive the public and induce customers to mistake one for the other. The use of one's own name is unlawful if exercised fraudulently to attract custom from another bearer of it. Trademarks, properly so called, may be violated by accident or ignorance. The law protects them, nevertheless, as property. Names which are not trademarks strictly speaking may be protected <sup>106</sup> likewise, if they are taken with fraudulent intention, and if they are so used as to be likely to effect such intention.

A leading and instructive case upon this subject is *Croft v. Day*, 7 Beav. 84, 88, in which Lord Langsdale, M. R., says: "It has been very correctly said that the principle, in these cases, is this, that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

The same principle is applied in *Sanders v. Utt*, 16 Mo. App. 322, and *Sanders v. Jacob*, 20 Mo. App. 96, where the name "N. Y. Dental Rooms" was protected.

In all such cases it is obvious, as defendant urges, that the effect of imitation depends very much upon propinquity. In many cases, the use of a similar trade name, in localities not very remote from each other, would not justify an inference that the establishments were those of a common proprietor, and



so would not result in damage or support an allegation of fraud. The character of the name adopted by the complainant suggests a distribution of officers. It would be natural for a person reading the advertisement of the complainant in a Pawtucket paper, and seeing the signs of the <sup>197</sup> defendant displayed there, to suppose that they indicated a branch office of the same concern; and this we have no doubt the defendant intended should happen. It is the only result which he could anticipate from his contrivances.

We conclude, therefore, that the complainant is entitled to an injunction restraining the use by the defendant of the words "U. S. Dental Rooms" or the letters "U. S." upon his signs or windows, and all words, letters, and symbols tending to indicate that his business is conducted or managed by the plaintiff.

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**TRADEMARKS — TRADE NAMES — DECEPTION — INJUNCTION.**—A trademark is something to denote the origin, ownership, or maker of goods: *Gessler v. Grieb*, 80 Wis. 21; 27 Am. St. Rep. 20; *Cigarmakers' Protective Union v. Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726. Common words, employed in their ordinary sense, do not constitute a trademark, and their employment does not confer any proprietary right to their exclusive use: *Radam v. Capital Microbe etc. Co.*, 81 Tex. 122; 26 Am. St. Rep. 783; monographic note to *Partridge v. Menck*, 47 Am. Dec. 292, on trademarks. Mere words cannot be used as a trademark, except they indicate origin, ownership, or the maker: *Metcalf v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 282. One cannot use another's trademark, even innocently: *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537; but one may use the same trade name as another, so long as he resorts to no device or artifice to create the impression that the goods manufactured or sold by him are manufactured or sold by such other party: *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147; 2 Am. St. Rep. 73, and note; *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537; *Weinstock v. Marks*, 109 Cal. 529; 50 Am. St. Rep. 57. If he does resort to deception, and the similarity of the name is calculated to deceive the public, its use will be enjoined: *Woodward v. Lazar*, 21 Cal. 448; 82 Am. Dec. 751; *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537. Any similarity of name likely to deceive or mislead an ordinary unsuspecting customer, and divert and secure his trade from the person who established a trade name is a fraud which may be restrained by injunction. Thus, the use of the words, "Mechanical Store" is an infringement upon the trade name, "Mechanics' Store": *Weinstock v. Marks*, 109 Cal. 529; 50 Am. St. Rep. 57. Property in a trade name will be protected: *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278. So, if one uses the trademark of another, an intention to deceive is presumed, and such wrongful use may be enjoined: *Notes to Weinstock v. Marks*, 50 Am. St. Rep. 67; *Radam v. Capital Microbe etc. Co.*, 26 Am. St. Rep. 703.

## WATSON v. STEINAU.

[19 RHODE ISLAND, 218.]

**JUDGMENT OF SISTER STATE—ACTION OF DEBT—SERVICE OF PROCESS.**—A judgment of a court of a sister state, rendered against several defendants jointly, in an action where one of them was not served with process, cannot be enforced in this state, by an action of debt thereon even against that one of the defendants who, in the foreign court, was served with process.

**JUDGMENT—ENTIRETY OF.**—The plaintiff who sues on a joint judgment must recover against all of the defendants or none, for the judgment is an entirety, and a defense good for one is good for all. Hence, the fact that one of them was not served with process is a good defense for the others.

Action of debt on a judgment brought by Watson & Newell against the Steinau Brothers. There was a special plea to the declaration, to which plea one of the plaintiffs demurred, and the case was certified.

Harry C. Curtis, for the plaintiffs.

Warren R. Perce, for the defendants.

**218** TILLINGHAST, J. This is an action of debt on judgment. The declaration sets out that the plaintiffs, on the ninth day of May, 1883, recovered a judgment of the superior court of the city of New York, against the defendants, for the sum of two thousand five hundred and six dollars and eighty-nine cents, debts and costs of suit, as by the record thereof now remaining in said court appears; which said judgment is in full force and not reversed, annulled, or satisfied. Said declaration further sets out that the persons who composed said defendant firm at the time of the rendition of said judgment were Isaac Steinau, Jacob A. Steinau, and Samuel J. Steinau, and that the writ in the case at bar has only been served upon Jacob Steinau. In connection with said declaration, the plaintiff has filed a paper which is styled "a transcript of judgment," and which shows, among other things, that one of said defendants, viz., Samuel J. Steinau, was not summoned in the action upon which said judgment was rendered.

To this declaration the said defendant Isaac Steinau has **219** filed a special plea, in which he sets up the fact that said Samuel J. Steinau was not summoned or served with any process in the suit in New York upon which the judgment aforesaid was based. Therefore he prays judgment, etc. To this plea the plaintiffs demur.

The question presented, therefore, for our determination is, whether a judgment of a court of another state, rendered against several defendants jointly in an action where one of them was not served with process, can be enforced in this state by an action of debt thereon against one of the defendants who in the foreign action was served with process.

We think this question must be answered in the negative. From the pleadings in the case, as they now stand, it appears that the New York court rendered judgment against all of said defendants, when only two of them had been served with process. And this being so, and no statutory authority being shown for any such proceeding in that state, the record shows that said court was without jurisdiction as to said defendant Samuel J. Steinau, and that the judgment as to him was a mere nullity. The question then arises as to what effect this has on the other defendants who were served with process. While there is some conflict of authority upon this question, yet we think the rule which is established by the preponderance of authority is, that the plaintiff who sues on a judgment must recover against all the defendants or none. For, the judgment being an entirety, whatever constitutes a good defense for one of the defendants operates also for the benefit of the others: *Hall v. Williams*, 6 Pick. 232; 17 Am. Dec. 356; *Oakley v. Aspinwall*, 4 N. Y. 514; *Richards v. Walton*, 12 Johns. 434; *Holbrook v. Murray*, 5 Wend. 161; *Rangely v. Webster*, 11 N. H. 299; *Knapp v. Abell*, 10 Allen, 485; *Buffum v. Ramsdell*, 55 Me. 252; 92 Am. Dec. 589; *Hulme v. Janes*, 6 Tex. 242; 55 Am. Dec. 774; *Brockman v. McDonald*, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218; *Winslow v. Lambard*, 57 Me. 356; *Burt v. Stevens*, 22 N. H. 229; *Donnelly v. Graham*, 77 Pa. St. 274; *St. Louis v. Gleason*, 15 Mo. App. 25; *Wright v. Andrews*, 130 Mass. 149; *Pratt v. Dow*, 56 Me. 81. See, also, *Frothingham v. Barnes*, 9 R. I. 474.

<sup>220</sup> The case of *Nathanson v. Spitz*, 19 R. I. 70, relied on by plaintiffs' counsel, does not affect the question here presented. In that case, the action was based upon a joint contract, and we held that, under chapter 13, section 18, of the judiciary act, and also in view of the fact that the sheriff had made a non est return as to the defendant who was not served, which return practically operated as a proceeding of outlawry as to him, the action could be maintained against one of the joint contractors. This suit, however, is not based upon the joint contract of the



three defendants above named, but upon a judgment rendered against them jointly, in an action where only two of them were served with process.

The demurrer is overruled and the plea sustained, and the case is remitted to the common pleas division for further proceedings.

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**JUDGMENT—SEVERAL DEFENDANTS—SOME, ONLY, SERVED.**—A judgment rendered against several defendants, when some of them only were served with process, is void as against all of them: *Hulme v. Janes*, 6 Tex. 242; 55 Am. Dec. 774. That such a judgment is voidable only, see *Newburg v. Munshower*, 29 Ohio St. 617; 23 Am. Rep. 769. In an action on a judgment recovered in another state against two defendants, only one of whom was served with process, there can be no recovery even against the one served: *Hanley v. Donoghue*, 59 Md. 239; 43 Am. Rep. 554; *Wood v. Watkinson*, 17 Conn. 500; 44 Am. Dec. 562; *Hall v. Williams*, 6 Pick. 232; 17 Am. Dec. 356. A judgment against two defendants jointly is one and entire: *Buffum v. Ramsdell*, 55 Me. 252; 92 Am. Dec. 589. A judgment or decree is a nullity unless it is shown that all parties to it were either actually or constructively served with process: *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456; *Buffum v. Ramsdell*, 55 Me. 252; 92 Am. Dec. 589. See the discussion of this subject in the extended note to *St. John v. Holmes*, 32 Am. Dec. 604-607.

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## MACAULEY v. TIERNEY.

[19 RHODE ISLAND, 255.]

**TORTS — "INJURY" DEFINED — TRADE — WRONGFUL ACT—ACTION.**—Generally speaking, no one has a right intentionally to do an act with the intent to injure another in his business; but injury, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance.

**RESTRAINT OF TRADE—CONDUCT OF ONE'S OWN BUSINESS.**—Every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of the violation of contractual relations, are instances.

**RESTRAINT OF TRADE—THREAT TO WITHDRAW PATRONAGE—COERCION.**—A threat of the withdrawal of patronage from wholesale dealers, unless they comply with a certain condition as to patronage, does not amount to coercion, where they are free to comply with the condition, or not, as they see fit. One may bestow his patronage on whomsoever he chooses, and annex any condition to its bestowal that he may wish.

**RESTRAINT OF TRADE—AGREEMENT AMONG MEMBERS OF ASSOCIATION AS TO BESTOWAL OF PATRONAGE.**

If the members of an association of master plumbers wish to free themselves from the competition of those who are not members, they may lawfully accomplish that object by an agreement among themselves not to deal with wholesalers who sell plumbers' supplies to those not members of the association, as such agreement is not unlawful.

**RESTRAINT OF TRADE—NOTICES AS TO BESTOWAL OF PATRONAGE—INJUNCTION.**—The sending of notices, by the members of an association of master plumbers, who have agreed among themselves not to deal with wholesalers who sell plumbers' supplies to those not members of the association, to such wholesalers, not to make such sales under the penalty of the withdrawal of the patronage of the members of the association in case of a failure of the wholesalers to comply, is no ground for an injunction, although the nonmembers are, in consequence of such notices, unable to purchase supplies from wholesale dealers in this and other states, and although such notices are prompted by a selfish desire on the part of such members to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. Their desire to free themselves from that competition is a legal excuse for sending the notices.

**CONSPIRACY—BILL IN EQUITY FOR—WHAT MUST APPEAR.**—To maintain a bill in equity on the ground of conspiracy, it must appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, are unlawful. Otherwise, there is no ground for the charge of conspiracy, and the fact of combination is immaterial.

**CONSPIRACY—WHEN COMBINATION IS IMMATERIAL.** What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed are not unlawful.

Bill in equity for an injunction brought by the Macauley Brothers against Tierney and others.

Willard B. Tanner and Edward L. Gannon, for the complainants.

James Tillinghast, William R. Tillinghast, and Theodore F. Tillinghast, for the respondents.

**255 MATTESON, C. J.** The complainants are master plumbers engaged in the business of plumbing. In the transaction of their business they have been accustomed, and are obliged, to purchase from time to time materials from wholesale dealers in Rhode Island and other parts of the United States, and, among others, from L. H. Tillinghast & Co., of Providence, who with the New England Supply Company are the only wholesale dealers in plumbing materials in this state.

The respondents are also master plumbers and officers and members of the Providence Master Plumbers' Association, a voluntary association affiliated with the National Association of Master Plumbers of the United States of America.

<sup>256</sup> The latter association, on June 26, 1894, at Baltimore, in convention assembled, adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material selling to others than master plumbers; that the masters should demand of manufacturers and wholesale dealers in plumbing material to sell goods to none but master plumbers; that the association should keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers; that a committee be appointed by the association in every state and county for the purpose of reporting to the proper officers, at its head in the state, any violations of these resolutions; that the convention urge upon the association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction. Subsequently, a resolution of amendment was adopted, at St. Louis, that the interpretation of the resolutions be left in the hands of the executive committee with power. Still later a resolution was adopted at Washington "that it is the sense of this convention that in the future the interpretation of the term of 'master plumber,' as set forth in the above resolutions, to entitle him to purchase plumbing material, be construed to mean master plumbers that have qualified under state or local enactments where such exist."

It is alleged by the complainants that the interpretation put by the executive committee of the National Association on these resolutions is, that those only are to be regarded as master plumbers who are members of the National Association, or members of the several local associations affiliated with the National Association; that the complainants have been informed by various wholesale dealers in plumbing materials in the United States outside of this state that they will not sell them supplies unless they shall join the Providence Master Plumbers' Association, and that these dealers are forced to refuse to sell them supplies because of the resolutions referred to and the interpretation put upon them by the executive committee of the National Association, and because of the action of the Providence Master Plumbers <sup>257</sup> Association in causing such dealers to be notified not to sell to the complainants under the penalty, in case of their continuing to do so, of not selling to any member of the association; that the Providence Master Plumbers' Association, acting through the respondents, has issued notice to L. H. Tillinghast & Co. and the New England Supply Com-



pany to sell supplies to none but members of the association, and that, in consequence of these notices, these wholesale dealers have notified the complainants and other master plumbers that they will not sell plumbing materials to plumbers not members of the master plumbers' associations in the places in which they do a plumbing business, or members of the National Association; and that since the date limited in the notices these dealers have refused to sell to the complainants, and that they have been unable to purchase supplies from them and from other wholesale dealers in the United States because they are not members of the Providence Master Plumbers' Association.

The bill charges that the Providence Master Plumbers' Association and the National Association have conspired together to prevent the complainants from buying supplies anywhere in the United States, and utterly to ruin their business, unless they will submit to the conditions of membership in and become members of the Providence Master Plumbers' Association; avers that the business of the complainants will be irremediably ruined unless the respondents are enjoined from further action and are compelled to rescind the action which they have already taken, and prays that the respondents may be directed to rescind the notices given and all orders and requests, both oral and written, to any and all dealers in plumbers' supplies, not to trade with such dealers unless they shall refuse to sell supplies to any but members of such associations, and to rescind and withdraw any and all orders and requests to the National Association to prevent wholesale dealers outside of the state of Rhode Island from selling supplies to the complainants, and that the respondents may be enjoined from all further interference with the complainants by notifying such dealers not to sell<sup>258</sup> to them, or by further requests to said National Association to prevent them from buying supplies anywhere in the United States. Testimony has been submitted by the complainants tending to prove the allegations of the bill. Assuming that the allegations are fully sustained by the proof, have the complainants made a case entitling them to relief? We think not.

The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associa-

tions in case of a failure to comply, was unlawful because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?

We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be <sup>259</sup> to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurements of violation of contractual relations, are instances. A leading and well-considered case on this subject was *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. 598, 614; L. R. (1892) App. Cas. 25. In this case, the defendants, who were shipowners, had formed a league for the purpose of keeping in their own hands the control of the tea carrying trade between London and China, and for the purpose of driving the plaintiff and other competing shipowners from the field. The acts complained of as unlawful by which the defendants sought to accomplish their purpose were: 1. The offer to local shippers and other agents of a benefit by way of rebate if they

would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled; 2. The sending of special ships to Hankow, in the hope by competition to deprive the plaintiff's vessels of profitable freight; 3. The offer at Hankow of freights at so low a rate as not to repay the shipowner for his adventure, in order to smash freights and frighten the plaintiff from the field; 4. Pressure put on their own agents to induce them to ship only by the defendants' vessels and not by the plaintiff's. The plaintiff alleged that the league was a conspiracy, and claimed damages and an injunction against a continuance of the alleged unlawful acts. It was held that since the acts of the defendants were not in themselves unlawful, and were done by them with the lawful object of protecting and extending their own trade and increasing their profits, and that as they had employed no unlawful means, the plaintiff had no cause of action. Bowen, L. J., remarks: "His [the trader's] right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, <sup>260</sup> whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of the violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton v. M'Gawley*, Peake, 270; the obstruction of actors on the stage by preconcerted hissing: *Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205; the disturbance of wild fowl in decoys by the firing of guns: *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickering*, 11 East, 574, n; the impeding or threatening servants or workmen: *Garret v. Taylor*, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts: *Bowen v. Hall*, 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & B. 216—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply . . . that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in



the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection."

261 The case at bar contains no element of the character of those enumerated by the lord justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others as in the cases cited by the lord justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whosoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the associations more than that of the nonmembers, they would doubtless comply; otherwise they would not.

Closely analogous to the case at bar was the recent case of Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319. The plaintiff was a manufacturer and seller of lumber, having a large and profitable trade, both wholesale and retail, in Minnesota and the adjoining states. The defendants, comprising from twenty-five to fifty per cent of the retail lumber dealers in the states referred to, many of whom were or had been customers of the plaintiff, formed an association under the name of the North Western Lumbermen's Association, for the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers, by which they mutually agreed that they would not deal with any manufacturer or

wholesale dealer who should sell lumber directly to consumers not dealers at any point where a member of the association was carrying on a retail yard. The by-laws provided that any member of the association doing business in the town to which lumber thus sold by a manufacturer or wholesale dealer had been shipped should notify the secretary of the association, within thirty days after the <sup>262</sup> arrival of the shipment at its destination, who should thereupon notify the manufacturer or wholesale dealer by whom the shipment had been made that he had a claim against him for ten per cent of the value of such sale at the point of shipment; that if the secretary should be unable to obtain payment he should refer the matter to the directors, who should hear and determine the claim; that if the manufacturer or dealer refused to abide by the decision of the directors, it should be the duty of the secretary to immediately notify the members of the association of the name of the manufacturer or dealer, and that he refused to comply with the rules of the association; that if any member continued to deal with such manufacturer or wholesale dealer, he should be expelled from the association; that whenever the secretary of the association should succeed in collecting any such claim, the sum collected should be paid to the member or members, in equal shares, doing business at the place of the sale. The plaintiff sold two bills of lumber directed to consumers or contractors at points where members of the association were engaged in business. The secretary of the association, having been informed of the fact, notified the plaintiff, in pursuance of the provision of the by-laws, that he had a claim against him for ten per cent of the amount of the sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff from time to time promised to adjust the claim, but procrastinated and avoided doing so until finally the secretary threatened, unless the claim was immediately settled, to send the notice provided by the by-laws to all the members of the association. Thereupon the plaintiff brought its suit for an injunction. An ex parte injunction having been granted, the defendants obtained an order for the complainants to show cause why it should not be dissolved. The court refused to dissolve the injunction, but on appeal the order continuing the injunction was reversed. The court says: "Now, when reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers

or manufacturers, directly to consumers or other nondealers<sup>263</sup> at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notice to anyone but members of the association. There was no element of fraud, coercion, or intimidation, either toward the plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points, it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notice, they would be at entire liberty to trade with plaintiff or not, as they saw fit. By the provision of the by-laws, if they traded with the plaintiff they were liable to be 'expelled'; but this simply meant to cease to be members. It was wholly a matter of their own free choice which they preferred—to trade with the plaintiff or to continue members of the association": See, also, *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 511-519; 49 Am. Rep. 666; *Coe v. Murphy*, 159 Pa. St. 420, 421; 39 Am. St. Rep. 686; *Heywood v. Tillson*, 75 Me. 225, 233; 46 Am. Rep. 373.

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid as<sup>264</sup> though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object re-



lied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence, it follows that as the object of the combination between the members of the associations was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial: *Commonwealth v. Hunt*, 4 Met. 111, 129; 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen, 499; *Wellington v. Small*, 3 Cush. 145, 150; 50 Am. Dec. 719; *Carew v. Rutherford*, 106 Mass. 1, 14; 8 Am. Rep. 287; *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 521; 49 Am. Rep. 666; *Hunt v. Simonds*, 19 Mo. 583, 588; *Robertson v. Parks*, 76 Md. 118, 134, 135; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. 598; L. R. (1892) App. Cas. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233, 234; 40 Am. St. Rep. 319; *Delz v. Winfree*, 80 Tex. 400, 404; 26 Am. St. Rep. 755.

We are of the opinion that the bill should be dismissed.

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**RESTRAINT OF TRADE—COMBINATIONS—INJUNCTION.**—One man may lawfully refuse to deal with any man or class of men; and this right which one man may exercise singly, many may agree to exercise jointly and make simultaneous declaration of their choice by voluntary association: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319, and note. An agreement between the members of a retail lumber association that they will not deal with any wholesale dealer or manufacturer who sells to customers, not dealers, at a point where a member of the association is doing business, and containing a provision for notice being given to all members whenever a wholesaler makes any such sale, is not void as stipulating for an unlawful combination in restraint of trade, nor is a wholesaler who makes a sale in violation of such agreement entitled to enjoin such association from giving notice to all its members of the fact: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319. Compare *People v. Milk Exchange*, 145 N. Y. 267; 45 Am. St. Rep. 609, and note.

**CONSPIRACY—WHAT IS, AND WHAT IS NOT.**—Conspiracy, as commonly understood, is an agreement or combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful or criminal means; but agreements or combinations are not unlawful so as to constitute conspiracies unless they are for acts or

omissions, whether as ends or means, which would be unlawful apart from agreement: *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640, and note; *Cote v. Murphy*, 159 Pa. St. 420; 39 Am. St. Rep. 686. An association seeking to attain its ends by lessening the gains and profits of others, is lawful or unlawful according as such means are lawful or unlawful: *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346. But it is not unlawful for one to refuse to deal with another: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319.

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## STATE v. NELSON.

[19 RHODE ISLAND, 467.]

**CONSTITUTIONAL LAW—RIGHT TO HAVE TRIAL GO ON AFTER IT IS BEGUN.**—A constitutional provision declaring that: "No person shall, after an acquittal, be tried for the same offense," is a guaranty not only of the right to absolute immunity from a charge after an acquittal, but of the right to have a trial go on after it is begun, except in cases where it becomes impossible for the jury to proceed to a verdict.

**TRIAL—DISCHARGE OF JURY BEFORE VERDICT—DISCRETION OF COURT.**—A jury, in a criminal case, may be discharged when it is unable to agree upon a verdict, or when, from other causes, it becomes impossible to proceed to a verdict, and the accused may still be held for trial; but what facts will establish a necessity for discharging the jury rests in the discretion of the trial judge, which discretion is a judicial one, subject to review for manifest abuse.

**FORMER JEOPARDY—IMPROPER DISCHARGE OF JURY FOR SICKNESS OF JUROR ENTITLES PRISONER TO DISCHARGE.**—It is improper, during the trial of a criminal case, for the trial judge to discharge the jury upon being notified by an officer in attendance upon the court that the latter has received information, by telephone, that a juror is sick and unable to proceed with the trial, particularly where the defendant objects and requests a continuance until the next day, so that the real physical condition of the juror can be ascertained. There being no legal evidence of the sickness of the juror, there is no established fact upon which the court can exercise discretion in the matter; and the defendant, having been once placed in jeopardy, cannot, therefore, be tried again for the same offense, but is entitled to a discharge.

Conviction of the crime of receiving stolen property knowing the same to have been stolen. The defendant petitioned for a new trial.

Edward C. Dubois, attorney general, for the state.

Charles A. Wilson and J. Jerome Hahn, for the defendant.

468 STINESS, J. Upon a trial of the defendant in the common pleas division, in February, 1895, he was convicted of the crime of receiving stolen property, knowing the same to have

been stolen. Before the trial he moved for a discharge upon the following grounds, viz: That he had been put upon trial on the same indictment in January, 1895, before a jury duly impaneled and sworn; that the trial proceeded on the seventeenth, eighteenth, nineteenth, and twenty-first days of January; that on said twenty-first day of January, 1895, the presiding justice notified him that some officer in attendance upon the court had received information by telephone that one of the jurors was sick, and unable to proceed with the trial; that no other information as to the sickness of the juror was communicated to the presiding justice; that the defendant, insisting upon his right to be tried by the jury so sworn and impaneled, asked that the case be continued until the next day, in order that the real physical condition of the juror could be ascertained, which request was refused, and the jury was dismissed; that having thus been once placed in jeopardy of his liberty, he was entitled to be discharged. This motion, made in the form of a plea, was demurred to by the attorney general; the demurrer was sustained by the court, and the plea dismissed. The defendant now petitions for a new trial upon several grounds, but the only one which needs to be considered is, whether the ruling that the allegations of the motion to discharge were not sufficient in law was erroneous.

The language of the constitution of this state, article 1, section 7, is: "No person shall, after an acquittal, be tried for the same offense." The constitution of the United States, article 5 of the amendments, says: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." State constitutions differ in the same way. These provisions grow out of the common-law maxim that no one shall be twice vexed for the same cause. One provision implies a verdict of acquittal and the other a liability to conviction, or, as it is termed, a jeopardy, but both stand <sup>469</sup> for recognized rights—the right to absolute immunity from a charge after an acquittal, and the right to have a trial go on after it is begun. The latter right must necessarily be subject to exceptions in cases where the trial may be abortive, as from the illness of the judge, juror, or prisoner, inability of a jury to agree, and other well-known causes. In such cases, there is now no question that there may be another trial, under either form of constitutional provision. The constitutional provisions are a guaranty of rights, and not a limitation of them. The fact, therefore, that



our constitution speaks only of an acquittal does not imply that the right of an accused to have his trial proceed, except in cases of necessity, is taken away. It is doubtless on account of these constitutional provisions that the rule is held more strictly in favor of the accused in this country than it seems to be in England. In *Queen v. Charlesworth*, 1 Best & S. 460, it was held that where the jury was improperly discharged, against the will of the defendant, it was not equivalent to an acquittal, and the defendant was not entitled to go without day. But in this country courts have felt constrained by the constitutional guaranties in favor of a defendant, and have followed a much stricter rule. Thus, it was early held that the inability of a jury to agree upon a verdict did not justify the court in discharging the jury, and that in such case the defendant would not again be put in jeopardy: *William v. Commonwealth*, 2 Gratt. 568; 44 Am. Dec. 403; *Wright v. State*, 5 Ind. 290; 61 Am. Dec. 90; *State v. Alman*, 64 N. C. 364; *Mahala v. State*, 10 Yerg. 532; 31 Am. Dec. 591. But this is not now the law in two of the states cited: *State v. Jefferson*, 66 N. C. 309; *State v. Walker*, 26 Ind. 346; *State v. Leach*, 120 Ind. 124.

It is now well settled by general practice and concurrent authority that a jury may be discharged when it is unable to agree upon a verdict, or when, for other causes, it becomes impossible to proceed to a verdict; and that the accused may still be held for trial. In such cases, the jeopardy is interrupted, but no new jeopardy is imposed; nor is the right of the accused to go on with his trial disregarded, because the completion of the trial as begun has become practically impossible. <sup>470</sup> It follows, therefore, that the existence of such facts as will warrant the discharge of the jury must rest in the discretion of the trial judge; and the question comes in this case whether that discretion is an absolute discretion, which cannot be reviewed, or whether it is a judicial discretion, to be exercised in proper cases, which is subject to review. We think that the latter is the correct rule. Indeed, we know of no case which holds that the discretion is absolute, nor do we see how it could be so held without ignoring the rights of the accused. Cases arising upon the inability of a jury to agree come nearest to the exercise of an absolute discretion, because the facts arise under the eye and largely within the knowledge of the judge; but it is still a judicial discretion, which would be open to review for manifest abuse. The cases upon this subject are too numerous to be re-

viewed in full. They are cited in text-books, and are practically harmonious.

In the early case of *State v. McKee*, 1 Bail. 651, 21 Am. Dec. 499, it is held that the power of the trial court is a matter of discretion, but that it is a legal discretion, which must be exercised in conformity to known rules: See, also, *Dobbins v. State*, 14 Ohio St. 493; *Mitchell v. State*, 42 Ohio St. 383; *Commonwealth v. Fells*, 9 Leigh, 613; *Hilands v. Commonwealth*, 111 Pa. St. 1; 56 Am. Rep. 235. In *O'Brian v. Commonwealth*, 9 Bush, 333, 15 Am. Rep. 715, the court states the principle of the common law "that every interference on the part of the state, after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless upon facts clearly establishing a case of necessity, or showing the prisoner's consent, must operate as an acquittal, and this is the only mode of preserving and maintaining the constitutional provision on the subject."

In *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695, *State v. Allen*, 46 Conn. 531, *Doles v. State*, 97 Ind. 555, and *State v. Washington*, 89 N. C. 535; 45 Am. Rep. 700, the facts upon which the jury were discharged were heard and passed upon by the trial court, and the finding put upon the record. The judicial discretion thus exercised was sustained, upon review, and held to be no bar to <sup>471</sup> further prosecution. *State v. Emery*, 59 Vt. 84, sustains the discharge of the jury for the sickness of a juror, but it does not state how the fact was ascertained.

In the case before us, there was no legal evidence whatever of the sickness of the juror, and hence no established fact upon which the court could exercise discretion. There was no testimony of a physician, or of anyone who had seen the juror, that he was ill, nor any opportunity given to ascertain the fact. There was only a mere report. In *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436, it was held that the report of a sheriff to the court that the jury said they were unable to agree was not evidence upon which the court could act in discharging the jury; but that the jury should have announced their inability in the presence of the court. In *State v. Jefferson*, 66 N. C. 309, the case was given to the jury on Tuesday and the judge went to his home, instructing the clerk of the court to inform him by telegraph of the agreement, or failure to agree, of the jury before the Saturday night following. The clerk informed the judge, on Saturday, that the jury could not agree, and the

judge instructed the clerk to discharge the jury. Upon review, it was held that the prisoner should go without day, upon the ground that it was the duty of the judge to have been personally present in court, and to have found, judicially, the facts upon which his decision to discharge the jury was based; for the reason that judicial power cannot be delegated. The doctrine of these cases is sound. In criminal proceedings, the rights of a defendant cannot be lightly dealt with, nor can a judge arbitrarily discharge a jury, and require a defendant to be put to another trial. The question is a new one in this state, and we have no doubt of the good faith of the judge in discharging the jury. But if the facts set up in the defendant's motion were true, and upon demurrer they are taken to be true, they made a sufficient ground for a discharge, and the demurrer should not have been sustained, but overruled. The defendant had the right to a judicial finding upon the question of the necessity for dismissing the first jury, and in the absence of it, to a discharge. Consequently, the second trial was improper, <sup>472</sup> and the verdict must be set aside and a new trial granted. Such new trial takes the case back to the defendant's motion for a discharge.

The case will therefore be remitted to the common pleas division with instructions to set aside the verdict, to overrule the demurrer, and to allow a reasonable time to the attorney general to traverse the allegations of the motion if he shall see fit to do so.

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**TRIAL—DISCHARGE OF JURY BEFORE VERDICT.**—The discharge of a jury in a criminal case, without the consent of the accused, and not called for by some pressing necessity, operates as an acquittal: *Jones v. State*, 97 Ala. 77; 38 Am. St. Rep. 150; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; 6 Am. St. Rep. 757. The inability of the jury to agree authorizes their discharge. So does the sickness of a juror: *State v. McKee*, 1 Ball. 651; 21 Am. Dec. 499; note to *Mahala v. State*, 31 Am. Dec. 598; *Mixon v. State*, 55 Ala. 129; 28 Am. Rep. 695; note to *Yarbrough v. Commonwealth*, 25 Am. St. Rep. 527; monographic notes to *People v. Barker*, 1 Am. St. Rep. 525; *State v. Moor*, 12 Am. Dec. 547, discussing the subject. The sickness of a juror must be established in the presence of the accused, and it is reversible error for the court, of its own motion, or from mere reports unverified by affidavits, or unsupported by oaths administered in open court, and in the absence of the accused, to determine that there exists, because of such sickness, an unavoidable necessity that the remaining jurors should be discharged without verdict, and the record must affirmatively show the existence of the facts which induced the discharge of the jury: *State v. Smith*, 44 Kan. 75; 21 Am. St. Rep. 266. Compare *People v. Cage*, 48 Cal. 323; 17 Am. Rep. 436.



**AYLSWORTH v. CURTIS.**

[19 RHODE ISLAND, 517.]

**STATUTES—WHEN PENAL.**—A statute is clearly penal where it imposes a liability upon a person for its violation, and the only object of an action under it is to recover a penalty or forfeiture.

**STATUTES—WHEN REMEDIAL.**—If a statute, giving damages wholly to a party injured as compensation for a wrong and injury, has for its object more the indemnification of the plaintiff, in an action under it, than the punishment of the defendant, the statute is not penal, but remedial.

**STATUTES—PENAL IN PART—REMEDIAL IN PART.**—The same statute may be penal in one part and remedial in another.

**STATUTES—REMEDIAL—DAMAGES FOR LARCENY.**—A statute providing that, "whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration," simply provides a remedy in favor of the person whose goods are stolen whereby he may recover damages for the wrong and injury sustained. It is, therefore, remedial and not penal.

**ABATEMENT—SURVIVAL OF ACTION FOR LARCENY.**—Under a statute providing that a cause of action of trespass on the case for damages to personal estate shall survive, an action against a person convicted of the larceny of personal property, and in favor of the owner of the property taken, survives the death of the owner, for the injury sustained by him must necessarily result in direct and immediate damage to his personal estate.

Trespass on the case, certified on demurrer to a plea in abatement.

Clarence A. Aldrich, for the plaintiff.

John T. Blodgett, for the defendant.

**517** TILLINGHAST, J. This is an action of the case, and was brought under the Public Statutes of Rhode Island, chapter 204, section 222 (now R. I. Gen. Laws, c. 233, sec. 16), for the recovery of the **518** sum of thirteen thousand dollars for the larceny of certain personal property of the plaintiff of which crime the defendant is alleged to have been convicted. Said statute provides that "whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration." Subsequently to the commencement of the action, viz., on April 22, 1895, the plaintiff died and the defendant thereafter pleaded the death of the plaintiff in abatement. The plaintiff's executors thereupon entered their appearance in the case and filed a

demurrer to the defendant's plea and the question presented by the demurrer is whether the cause of action survives the plaintiff's death.

The statute relating to the survival of actions (R. I. Pub. Stats., c. 204, sec. 8), is as follows, viz: "In addition to the causes of action and actions which survive at common law, the death of the plaintiff or defendant therein, the following causes of action and actions shall also survive: 1. Causes of action and actions of waste; 2. Causes of action and actions of replevin and trover; 3. Causes of action and actions of trespass and trespass on the case for damages to the person or to real and personal estate."

We think this statute is clearly broad enough to include the case before us unless the action is a penal one, which we will consider later. The cause of action is the damage done by the defendant to the personal estate of the plaintiff in feloniously depriving him of the property set out and described in the indictment. And it certainly cannot be seriously contended that the larceny of personal property from the plaintiff did not result in a direct and immediate damage to his personal estate. This statute was fully considered in *Aldrich v. Howard*, 8 R. I. 125, 86 Am. Dec. 615, where it was held that it "provides not only for cases of trespass, where the injury is not only the direct but the immediate effect of a wrongful act forcibly done, but for actions of the case, where the damages are not immediate, but, to be recoverable, must be the natural and proximate consequence of the wrongful act alleged." If an action on the case for creating a nuisance, <sup>519</sup> whereby the plaintiff in that case suffered damages to his hotel, survives under the statute, a fortiori the action now before us, which is brought to recover damages for the larceny of the plaintiff's personal property, survives also. In *Reynolds v. Hennessy*, 17 R. I. 169, it was held that damages by a wrongful act to something recognized as personal estate gives rise to an action which survives both for and against an executor or administrator under said statute. In discussing the question of the survival of the action in that case, the court said: "We think it is clearly deducible from all the cases that, where there is simply a tort, not otherwise affecting the estate itself than by an indirect loss, an action *ex delicto* does not survive. . . . The difficulty generally is in drawing the line between tortious acts which must be held to damage one's personal estate and those which do not." The case

at bar is clearly one where the act complained of must be held to damage the personal estate of the deceased, and hence the action survives under the decision just referred to, unless it be held to be a penal action as aforesaid.

In support of defendant's contention that the action does not survive at common law, or under the provisions of the Public Statutes of Rhode Island, chapter 204, section 8, he relies on *Moies v. Sprague*, 9 R. I. 541. The action in that case was based on the statutory liability of an officer in a manufacturing corporation. The court held that it was a personal action of tort to recover a penalty, and did not survive at common law, and also that it was not within the statutory provision for the survivorship of actions. The decedent in that case had neglected to perform a statutory duty, the penalty of which was the incurring of a personal liability for the debts of the corporation. It is very clear that such an action does not survive under the statute. It is not within the terms of the statute. The action was not brought to recover damages to the person, or to the real or personal estate of the plaintiff. The defendant had caused no damage to either. He had simply neglected to discharge a statutory duty, whereby a cause of action had accrued to the plaintiff to recover the penalty prescribed <sup>520</sup> therefor. It will be seen, therefore, that the case is clearly distinguishable from the one now before us: See, also, *Leighton v. Campbell*, 17 R. I. 51; *Chase v. Curtis*, 113 U. S. 452.

But the defendant's counsel further contends that the action, though civil in form, is nevertheless a penal action, and hence does not survive. And in support of this contention he relies on the cases of *Cole v. Groves*, 134 Mass. 471, and *Yarter v. Flagg*, 143 Mass. 280. The former was a case brought under the provision of the General Statutes of Massachusetts, chapter 85, section 1, which authorized a third person to recover treble the value of money lost by gaming, where the person losing neglects to bring an action therefor within three months after the loss. The court held that said statute, "so far as it authorizes a third person to recover three times the sum of money or value of goods lost by gaming, is a penal statute." But it also held that the right of action given to the loser, which was limited to three months, was remedial. The case is therefore not an authority in support of the defendant's contention. The second case was an action of tort, under the Public Statutes of Massachusetts, chapter 99, sections 1 and 2, brought by the plaintiff,



who was also an informer, to recover of the owner of a building treble the value of money lost therein by Charles F. Yarter in gaming. The defendant died pending the action, and his executors appeared and filed a motion to dismiss on the ground that the action did not survive, which motion was granted, the court holding that said statute, in giving an action of tort to a common informer to recover of the owner of a place in which property is lost by gaming treble the value thereof, provides for the recovery of a penalty, and that the action did not survive either at common law or by the Public Statutes of Massachusetts, chapter 165, section 1. That decision, as well as the former, is doubtless correct; but it is not applicable to the case at bar, for the reason that the present action was not brought by an informer to recover a penalty given by statute, but was brought by the party directly injured, and is now being prosecuted for the benefit of his estate. It was brought to recover damages sustained by the plaintiff by <sup>521</sup> reason of the larceny of his goods, and not to recover a penalty. The statute under which it is brought simply provides a remedy in favor of the person whose goods are stolen, whereby he may recover damages for the wrong and injury sustained, and hence is remedial and not penal. That is to say: Where an action is founded entirely upon a statute, and the only object of it is to recover a penalty or forfeiture, it is clearly a penal action: *Hubbell v. Gale*, 3 Vt. 266; 18 Am. & Eng. Ency. of Law, 270; *Barnet v. National Bank*, 98 U. S. 555. But where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial: *Bones v. Booth*, 2 W. Black. 1226. In other words, as said in substance in *Blaine v. Curtis*, 59 Vt. 120, 59 Am. Rep. 702, where a liability is imposed by statute upon a person purely for a violation of its provisions, the statute is penal. But where it is a statute which is merely declaratory of a common-law right, coupled with a means or way enacted for its enforcement, giving a remedy for an injury against the person by whom it is committed to the person injured, and either limiting the recovery to the amount of loss sustained or to cumulative damages as compensation for the injury, it is a remedial statute. And, moreover the same statute may be penal in one part and remedial in another: *Gardner v. New York etc. R. R. Co.*, 17 R. I. 790; *Sedgwick on Statutory Law*, 2d ed., 33; *Potter's Dwarries on Statutes*, 75; 1 Wils. 126.

In *Stanley v. Horton*, 9 Price, 301, which was an action of debt founded on 11 George II, chapter 19, section 3, for assisting a tenant of the plaintiff in fraudulently removing and carrying away three cows, with intent to prevent the plaintiff from distraining them for arrears of rent, etc., whereby the plaintiff sought to recover double the value, it was held that said act of parliament was very clearly distinguishable from those which imposed penalties, Graham, baron, saying that he considered it entirely and purely remedial, providing, by giving double the value, for the aggravation <sup>522</sup> of the injury done to the landlord by the wrongful removal and concealment.

In *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662, which was an action on the case upon the statute to recover double damages for an injury to the plaintiff caused by a defect in the highway, the court held that the action was purely remedial. Shaw, C. J., in delivering the opinion, said: "All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is, that it is prosecuted for the purpose of punishment and to deter others from offending in like manner. . . . Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity."

In *Mitchell v. Clapp*, 12 Cash. 277, which was an action on the Revised Statutes of Massachusetts, chapter 58, section 13, giving double damages against a keeper of a dog in favor of a party sustaining damage by such dog, the court held that the statute was remedial and not penal. To the same effect are the cases of *Frohock v. Pattee*, 38 Me. 103; *Woodgate v. Knatchbull*, 2 Term Rep. 154; 3 Saund. 376, note 7; *Woodward v. Alston*, 12 Heisk. 581. See, also, *Sedgwick on Statutory Law*, 2d ed., 32; *Potter's Dwarries on Statutes*, 74, 75; *Endlich on Interpretation of Statutes*, 333; *Hyde v. Cogan*, 2 Doug. 702; 8 Am. & Eng. Ency. of Law, 270; *Mitchell v. Hotchkiss*, 48 Conn. 19; 40 Am. Rep. 146; *Lord Huntingtower v. Gardiner*, 1 Barn. & C. 299. In the late case of *Huntington v. Attrill*, 146 U. S. 657, the court, Gray, J., in a very exhaustive opinion, goes so far as to hold that the test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual; and that penal laws, strictly and properly, in the international sense at

any rate, are those imposing punishment for an offense committed against the state, and which the executive has the power to pardon.

The statute on which the action before us is based is materially different from the Massachusetts statute, which was <sup>523</sup> considered and held to be penal by this court in *O'Reilly v. New York etc. R. R. Co.*, 16 R. I. 388. Under that statute the damages are "to be assessed with reference to the degree of culpability of the corporation, or its servants or agents," and to the amount of at least five hundred dollars, thus clearly showing a punitive purpose in its enactment.

The same statute has since been construed by the supreme court of Vermont, in the case of *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 48 Am. St. Rep. 800, in which the court, in a very clear and forcible opinion by Munson, J., arrived at the same conclusion.

The demurrer to the plea in abatement is sustained, and the case remitted to the common pleas division for further proceedings.

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**STATUTES—PENAL AND REMEDIAL.**—A statute whose main purpose is to give compensation for an injury, or to punish a wrongdoer, is penal: *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76; 48 Am. St. Rep. 800. A statute which gives damages to a party injured is remedial: *Note to Reed v. Northfield*, 23 Am. Dec. 669.

**ABATEMENT—SURVIVAL OF ACTION—TORTS.**—Actions for wrongs done to property, or interests in property, survive, at least so far as the act of the offender is beneficial to his estate. If, by the wrong, property is acquired by the wrongdoer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property: See extended note to *Boor v. Lowrey*, 53 Am. Rep. 529, 531; note to *Payne's Appeal*, 48 Am. St. Rep. 226.



## SWIFT v. ROUNDS.

[19 RHODE ISLAND, 527.]

**FRAUD—DECEIT—BUYING ON CREDIT.**—The act of buying goods on credit, intending not to pay for them, is a good basis for an action of deceit, for there is an implied representation by the purchaser of an intention to pay.

Trespass on the case for deceit, brought by G. F. and E. C. Swift against Arthur Rounds. There was a demurrer to the declaration and the case was certified.

Willard B. Tanner, for the plaintiffs.

Robert W. Burbank, for the defendant.

**527** TILLINGHAST, J. This is trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels of the value of four hundred dollars, the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of four hundred dollars the defendant refuses to pay, to the plaintiffs' damage, etc. The second **528** count, after setting out the fraudulent conduct aforesaid, alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, etc.

To this declaration the defendant has demurred, and, for grounds of demurrer to the first count thereof, he says: 1. That the plaintiffs do not allege any false representation by the defendant; 2. That the plaintiffs do not allege that they have acted upon any false representation of the defendant; and 3. That the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant.

The grounds of demurrer to the second count are: 1. That the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject matter of a false representation, but simply a promise broken, and therefore not a ground of action of deceit; 2. That the plaintiffs do not

allege that they acted upon any false representation made by the defendant; and 3. That the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device whereby one person deceives another, who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well: Grinnell on Law of Deceit, 35. A man may not only deceive another, to his hurt, by deliberately <sup>529</sup> asserting a falsehood, as, for instance, by stating that A is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him: 1 Story's Equity Jurisprudence, sec. 192. In *Ex parte Whittaker*, L. R. 10 Ch. App. 449, Mellish, L. J., says: "It is true, indeed, that a party must not make any misrepresentation, express or implied, and, as at present advised, I think Shackelton, when he went for the goods, must be taken to have made an implied representation that he intended to pay for them, and, if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown": See, also, *Lobdell v. Baker*, 1 Met. 201; 35 Am. Dec. 358; 1 Benjamin on Sales, ed. of 1888, sec. 524.

In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them, but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words, or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the

contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with intent not to perform it. By the act of purchasing the goods on credit, the defendant impliedly represented that he intended to pay for them. The plaintiffs relied on this representation, which was material and fraudulent, and were damaged thereby. All the necessary elements of fraud or deceit therefore were present in the transaction: See *Upton v. Vail*, 6 Johns. 181; 5 Am. Dec. 210; *Bartholomew v. Bentley*, 15 Ohio, 666; 45 Am. Dec. 596; Bishop on <sup>530</sup> Noncontract Law, secs. 314-318; *Burrill v. Stevens*, 73 Me. 400; 40 Am. Rep. 366; *Barney v. Dewey*, 13 Johns. 226; 7 Am. Dec. 372; *Hubbell v. Meigs*, 50 N. Y. 491. The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to *Paisley v. Freeman*, 3 Term Rep. 51; 2 Smith's Lead. Cas. 191. As said by Bigelow on Fraud, page 484: "To profess an intent to do or not to do when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made": See, also, page 466 as to what constitutes a representation. In *Goodwin v. Horne*, 60 N. H. 486, the court say: "Ordinarily, false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable or can be made the ground of defense. . . . But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them." In *Byrd v. Hall*, 1 Abb. App. Dec. 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet where it is made with a preconceived design not to pay, it is fraudulent: See, also, *Milliken v. Mullar*, 12 R. I. 296; *Thompson v. Rose*, 16 Conn. 81; 41 Am. Dec. 121; *Hennequin v. Naylor*, 24 N. Y. 139; *Devoe v. Brandt*, 53 N. Y. 465; Story on Sales, 2d ed., sec. 176, and cases in note 2; *Douthitt v. Applegate*, 33 Kan. 395; 52 Am. Rep. 533; *Morrill v. Blackman*, 42 Conn. 324; *Skinner v. Flint*, 105 Mass. 528; *Earl of Bristol v. Wilsmore*, 2 Dowl. & R. 760; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; Cooley on Torts, 2d ed., 559; *Load v. Green*, 15 Mees. & W. 215. In short, the making of one state of things to



appear, to those with whom you deal, to be the true state of things, while you are acting on the knowledge of a different state of things—among the oldest definitions of fraud in contracts—is exemplified in this case: See *Lee v. Jones*, 17 Com. B., N. S., 494. The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them. And to hold that such a transaction <sup>531</sup> does not amount to fraud, would be to make it easy for cheats and swindlers to escape the just consequence of their unrighteous acts.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie, upon the facts set out in the declaration, for the reason that, amongst the numerous cases of fraud and deceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In *Lyon v. Briggs*, 14 R. I. 224, 51 Am. Rep. 372, which was an action of deceit, Duffee, C. J., intimates, however, that deceit would lie in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover, or in some other action of tort, for the damages sustained by the fraud. And this being so, we fail to see why an action of deceit, which is an action of tort, based on fraud, may not lie as well. For to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be falsely to represent in words any material fact whereby the vendor should be induced to part therewith.

But defendant's counsel contends that the alleged representation was not as to any fact present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a

given time is as much a fact as is the state of his digestion. Intention is <sup>532</sup> a fact: *Clift v. White*, 12 N. Y. 538; hence a witness may be asked with what intent he did a given act: *Seymour v. Wilson*, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. It is true the purchaser may afterward repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong and the liability incurred thereby. Of course, a mere intention to commit a crime or to do a wrong is no offense. But when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated and the corresponding liability incurred: See *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53.

In *Stewart v. Emerson*, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant, Doe, J., in the course of a long and vigorous opinion, used the following language, which is so apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B, though unable to pay others. His fixed purpose never to pay B is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit with an unconcealed determination that they should never be paid for? The concealment of such a determination is <sup>533</sup> conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (*Bradley v. Obear*, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive."

"An application for or acceptance of credit, by a purchaser, is a representation of the existence of an intent to pay at a future time, and a representation of the nonexistence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretense of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is, of course, concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled, and case remitted to the common pleas division for further proceedings.

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**FRAUD.—PURCHASE OF GOODS, ON CREDIT**, by one who, at the time, does not intend to pay for them is a fraud: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note; and the seller may treat the sale as void: *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53. The true point of inquiry in such cases is, whether there was a pre-conceived design not to pay for the goods: *Hall v. Naylor*, 18 N. Y. 588; 75 Am. Dec. 269. Fraud or deceit, with damage, gives a good cause of action: *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586.

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## WHIPPLE *v.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[19 RHODE ISLAND, 547.]

**RAILROAD COMPANIES AS MASTERS—SAFE PLACE TO WORK.**—A railroad company, like any other employer, must use ordinary and reasonable care not to subject its servant to unreasonable danger by putting him at work on dangerous premises, or with dangerous appliances. If it fails in this respect, and the servant is injured in consequence of such failure, without fault on his part, and without having voluntarily assumed the risk of the company's negligence, with full knowledge, or competent means of knowledge, of the danger, he is entitled to recover.



**RAILROAD COMPANIES—NEGLIGENCE—DANGEROUS TELEGRAPH POLE.**—A railroad company which maintains a telegraph pole slanting toward the track, and in such close proximity thereto as to make it dangerous for the company's brakemen, while properly performing their duties, is guilty of negligence, and is answerable to a brakeman injured thereby, without fault on his part, where he is exercising ordinary care, and has not assumed the risk of the company's negligence, with full knowledge, or competent means of knowledge, of the danger.

**RAILROAD COMPANIES—TELEGRAPH POLE—OBVIOUS DANGER.**—If a telegraph pole stands about three and one-half feet from a railroad track, but inclines toward it, the danger in passing it on a freight-car is not obvious from reasonable observation, where the space between the pole and the top of the car is about fifteen inches, which is sufficient for a man to pass, if standing erect on a ladder at the side of the car, but insufficient by seven or eight inches for him so to pass while in the act of climbing the ladder. Hence, if a brakeman, having no knowledge of the dangerous proximity of the pole to the track, is knocked from a freight-car and injured, by striking the pole, while climbing such ladder, in the performance of his duties, the company is answerable to him, in an action for the injury, as the danger cannot be said to have been so obvious as to charge the plaintiff with knowledge of it.

**RAILROAD COMPANIES—INJURY TO BRAKEMAN FROM TELEGRAPH POLE—CONTRIBUTORY NEGLIGENCE.**—A brakeman employed by a railroad company in making up freight trains is not, as a matter of law, guilty of contributory negligence in attempting to climb a ladder on the side of a freight-car, while the car is in motion, without looking forward to see whether he is in danger of being struck by a telegraph pole standing in dangerous proximity to the track and slanting toward it, where he has no particular reason to apprehend danger from it. He has a right, until apprised to the contrary, to rely on the presumption that the company has performed its duty in locating the pole so that it will not endanger the safety of its employes.

**EVIDENCE—DISTANCE BETWEEN CAR AND TELEGRAPH POLE.**—In an action by a brakeman, who was injured, while engaged in making up a freight train, by being struck and knocked from a certain freight-car by a telegraph pole standing in dangerous proximity to the track and slanting toward it, the distance between the pole and the side of that particular car may be proved by showing the distance between the pole and another car of the same pattern and dimensions as the one on which the injury occurred, where the plaintiff has no means of identifying the latter, and it is not shown that it is available for measurement.

**NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—A new trial of an action for damages for personal injuries will not be granted on the ground of newly-discovered evidence, which is all directed to the question of the extent of the plaintiff's injuries, and which would not be likely to lessen the verdict if a new trial were granted.

Action for negligence. There was a verdict for the plaintiff, and the defendant petitioned for a new trial.

Walter B. Vincent, for the plaintiff.

Frank S. Arnold, for the defendant.

588 MATTESON, C. J. This is an action of the case for negligence. The accident which caused the injuries to the plaintiff occurred about 2 o'clock in the afternoon, on December 22, 1894, in the defendant's freight yard in Providence, where the plaintiff had been employed as a brakeman in the making up of freight trains for two or three months previously. Just prior to the accident the switching engine, with the plaintiff riding on the footboard, on the rear of the tender, had backed down in a southerly direction on a sidetrack to a point opposite the freighthouse, for the purpose of taking on some cars standing on the sidetrack. The plaintiff stood on the left hand end of the footboard as the engine was backing down, looking toward the cars which were to be coupled to the engine. When the engine had reached the cars, the plaintiff made the coupling, gave the signal to the engineer to go ahead, and started to climb onto the top of the car next to the engine, his duty requiring him to be in that position so that he could transmit to the engineer the signals which should be given to him by the conductor. There was no ladder on the end of the car, and, in order to climb to the top of it, the plaintiff stepped from the footboard onto the drawbar of the tender, thence obliquely to the left onto the corner of the car, at the same time taking hold of a round of the ladder on the westerly side of the car near the end, and swinging himself around the car, and began to ascend the ladder. Meanwhile the train had started, in obedience to the signal given to the engineer to go ahead; and when the plaintiff had so far ascended the ladder that his left hand was on the topmost round, and he was reaching up with his right hand for the handle on the top of the car, his back came in contact with a telegraph pole, belonging to the defendant and used to support 589 some of its signal wires, and he was swept from the ladder and fell to the ground, receiving the injuries for which he sues. The telegraph pole was three feet five and one-quarter inches from the outside of the westerly rail of the sidetrack, and had stood in that location for a number of years. The side of a car such as was in use by the defendant at the time of the accident projected beyond the side of the rail twenty inches, and the ladder on the side of it three and one-eighth inches farther. The pole inclined somewhat toward the sidetrack, so that at the height of eleven feet, that being the height of the top of the car, the space between the pole and the ladder was fifteen and one-eighth inches. By experiment, made subsequently to the acci-

dent, it appeared that this space, though sufficient for a man to pass without coming in contact with the pole, if standing erect on the ladder, was not sufficient by seven or eight inches for him to pass the pole without coming in contact with it when in the act of climbing the ladder. The jury in the common pleas division returned a verdict for the plaintiff, and the defendant petitions for a new trial alleging that the verdict is against the evidence, that the instructions of the court to the jury were erroneous, and because of newly discovered testimony.

The defendant contends, in support of its petition, that it had a right to locate its telegraph poles, switch stands, bridge abutments, station platforms, and other similar structures, near to its tracks, although the location and maintenance of these structures in close proximity to its tracks might involve the risk of injury to its employes; that as the danger of contact with such structures is a matter of common knowledge, and as they are objects plainly visible, their presence is at once suggestive of danger, and therefore that the risk of being hit by a pole was an obvious danger, and one assumed by the plaintiff when he entered into the defendant's service. There are cases which apparently support these contentions, but they do not commend themselves to our judgment. We do not think that a different rule should be applied to railroad corporations from that which is established in reference <sup>590</sup> to other employers, viz., that the master is bound to take ordinary and reasonable care not to subject his servant to unreasonable danger by sending him to work on dangerous premises, or with dangerous appliances, and that if he fails in this respect and the servant has been injured in consequence, without fault on his part and without having voluntarily assumed the risk of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he is entitled to recover for the injury sustained: *Thompson on Negligence*, 972, 973, and cases cited. In view of this rule, we cannot doubt that the location and maintenance of the telegraph pole in the position in which it stood relatively to the sidetrack was negligence, since the necessary result was to expose brakemen, in the discharge of their duty in the usual manner, to the risk of accident such as befell the plaintiff: *Dorsey v. Phillips etc. Co.*, 42 Wis. 583; *Murphy v. Wabash R. R. Co.*, 115 Mo. 111; *Johnson v. St. Paul etc. Ry. Co.*, 43 Minn. 53; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54; *New York etc. R. R. Co. v. Ostman*, 146 Ind. 452.



It is undoubtedly true that a servant assumes all the ordinary risks and perils incident to the employment, and also all risks resulting from the nonperformance of the master's duty of which he has knowledge or of which he has competent means of knowledge, if he continues in the employment after such knowledge or means of knowledge, unless induced to remain by promises of the master to remedy the defect. But a telegraph pole is not in itself dangerous. It becomes so, and therefore a defective structure, only when placed so near the track that it is a source of danger to the servant in the performance of his duty. If the servant has knowledge of its dangerous proximity, or if, by reasonable observation, he could have ascertained its dangerous proximity, it is undoubtedly to be regarded as an obvious danger, the risk of which is assumed by continuing in the service. Otherwise it is not to be so regarded.

591 In the case at bar, it does not appear that the plaintiff had knowledge of the dangerous proximity of the pole to the track. Unless, therefore, the fact was sufficiently obvious to have been ascertained by him by reasonable observation, he is not to be held to have assumed the risk of injury from it. We do not think that the fact was sufficiently obvious. The difference between the distance which the pole stood from the track and the distance which would have been safe was only seven or eight inches. The plaintiff had never before the accident, so far as appears, passed or attempted to pass the pole on the side ladder of a car. The only opportunities which he had had to judge of its proximity to the track were from passing it on foot and on the tops of moving cars in the course of his employment, neither of which situations would be favorable for estimating the distance of the pole from the side of a car moving along the track, with sufficient accuracy to know whether or not the pole was safe, the margin of safety or danger being so slight a space. Moreover, even after the accident the testimony shows that experiments were conducted by the defendant for the purpose of determining whether or not the pole was near enough to the track to be dangerous. How can it be said that the proximity of the pole to the track was an obvious defect, when the danger could only be determined by experiment or by measurement and calculation? To the suggestion that the telegraph pole was plainly visible, and that the danger of contact with such a structure is a matter of common knowledge, it is enough to answer that the fact tends, not to prove that the pole is an obvious de-

fect, but rather that the officers of the railroads, in the location of such structures, in many instances disregard their duty and consult expense or their own convenience instead of safety of life and limb.

It is urged that if the proximity of the pole to the track which made it dangerous was not sufficiently obvious to the plaintiff to put him on his guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable care, and hence that it cannot be held that the defendant <sup>592</sup> was negligent in maintaining the pole in its position. But the answer is, that the officers of the defendant located the pole; that it was their duty to have so located it as to make it safe; and, consequently, that if they failed in that respect, the defendant must be held chargeable for their default.

The defendant further contends that the plaintiff was guilty of contributory negligence in attempting to climb the ladder of the car while the train was in motion, without looking to see whether he was in danger from the pole, instead of climbing to the top of the car before giving the signal to the engineer to go ahead, or remaining on the footboard of the tender until the car had passed the pole. But if the dangerous proximity of the pole to the track was not so obvious as to be discoverable by observation, and the plaintiff had no notice of the danger, we do not think that it can be held, as a matter of law, that he was guilty of negligence in not looking forward to see whether he was in danger from the pole before starting to climb the ladder. If he had no reason to apprehend danger from it, there was no reason why he should have been on his guard against it. He had a right to rely on the presumption that the defendant had performed its duty in locating the pole so that it should not endanger the safety of its employes, until he had been apprised in some way of the contrary. If the exigency of the situation required the placing of a structure in such a position as to make it dangerous, it is not too much to require of a railroad company that it should give notice of the danger to its employes: *Darling v. New York etc. R. R. Co.*, 17 R. I. 708; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 732; *Johnson v. St. Paul etc. Ry. Co.*, 43 Minn. 53; *Hawkins v. Johnson*, 105 Ind. 29; *Baker v. Maryland Coal Co.*, 84 Md. 19.

The defendant contends that the common pleas division erred in admitting the testimony of Latham, a civil engineer, for the

purpose of proving the distance between the pole and the side of the freight-car, the car not being the one on which the plaintiff was at the time of the accident. The plaintiff had no means of identifying the particular car on <sup>593</sup> which he was riding at the time of the accident, and it is a matter of common knowledge that freight-cars are here to-day and many miles away to-morrow. In the absence of evidence to show that the particular car on which the plaintiff was at the time of the accident was available for measurement, we think that it was proper for the court to admit the testimony, it being shown that the car used for the purpose of measurement was of the same pattern and dimensions as the other.

We do not deem it necessary to examine seriatim the several requests for instructions made by the defendant, and the rulings on these requests by the common pleas division. The requests were inconsistent with the principles which seem to us to govern the decision of the case, and we think that the instructions of the court to the jury were sufficiently favorable to the defendant.

The newly discovered evidence is all directed to the question of the extent of the plaintiff's injuries. As the verdict was only for fifteen hundred dollars, and it is not denied that the plaintiff was confined to his bed for five or six weeks, during which time he suffered much pain, we do not think that the newly discovered testimony, which goes merely to his improved condition subsequently to that period, is of such importance that it would be likely to lessen the verdict if a new trial were granted.

New trial denied, and case remitted to the common pleas division with direction to enter judgment for the plaintiff on the verdict.

Stiness, J., dissented on the ground that the pole was an obvious defect.

A SIMILAR CASE to that of the principal one is *Crandall v. New York etc. R. R. Co.*, 19 R. I. 594, an action for negligence. The opinion runs as follows: "The accident by which the plaintiff was injured occurred December 8, 1893. The plaintiff had been a conductor of passenger trains in the service of the defendant for a number of years. For several years prior to the accident it had been a part of his duty to run during alternate weeks a passenger train, one trip daily, over the Pawtuxet Valley branch of the defendant's road, from Auburn to Hope, and from Hope to Auburn. On the date named, he left Providence on his train at 2:30 P. M., and, on arriving at Pontiac, was ordered by the telegraph operator at that station to place his train on the south sidetrack, a little beyond the



station toward Hope, in order to allow a freight train coming from Hope, which was too long to be run onto the sidetrack, to pass on the main track. In compliance with this order, the plaintiff run his train onto the sidetrack, and, in the performance of his duty, as he alleges, took his position near the forward end of the first car, between the sidetrack and the main track, so that, if any of the passengers on his train should get off, he might warn them against passing over the main track in front of the approaching freight train. When the freight train had passed, he, without looking forward toward the engine of his train, signaled the engineer to start the train, and, when in the act of stepping up onto the steps of the car, near which he was standing when he gave the signal to the engineer, was caught and squeezed between a telegraph pole standing near the sidetrack and the forward end of the car, receiving the injuries for which he sues. After the accident the telegraph pole was removed to another location, so that its exact position relatively to the sidetrack at the time of the accident cannot be determined. The testimony, however, tends to show that it was so near to the track that it would clear the side of the car by not more than twenty inches. At the trial in the common pleas division the jury returned a verdict for the plaintiff; and the defendant now petitions for a new trial on the ground that the verdict was against the evidence, and that the court erred in refusing to admit certain testimony, and in its instructions to the jury.

"We do not think that the verdict was against the evidence. The erection and maintenance of the telegraph pole so near to the sidetrack as to expose its employés to the risk of injury while performing their duties was negligence on the part of the defendant: *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587; ante, p. 796. The question whether the plaintiff was guilty of contributory negligence in not looking forward to see if there was any obstacle that might hit him in attempting to get onto the train before giving the signal to the engineer to start the train, or in not getting upon the train before giving the signal, was for the determination of the jury. In view of the facts appearing in evidence, that the plaintiff's duties as a passenger conductor were to a great extent inside the train, and therefore he did not have the opportunity to familiarize himself with structures along the track; that he did not know the location of this pole; that he had never before been upon the sidetrack; that his attention was directed to the passing of the freight train and to seeing that none of his passengers, if they should alight from the train, attempted to cross the track in front of the freight train; that the road was a single-track road, and the time for him to run to Hope and back again to Auburn to make his train connection at that station was short, we think that the question whether he was in the exercise of due care was one upon which reasonable minds might differ, and that therefore, the jury having found that he was not negligent, we ought not to disturb their finding.

"We do not think that the plaintiff is to be held to have assumed the risk of injury from the pole. The risk was not one incident to the employment, because the defect—the location of the pole dangerously near to the sidetrack—was a breach of the defendant's

duty so to locate the pole that it should not be dangerous to its employés. The risk of injury from such a defect is not assumed by the employé unless he has knowledge or competent means of knowledge of it, and continues in the employment: *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587; ante, p. 796; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733; *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 79; 28 Am. Rep. 206; *Baker v. Maryland Coal Co.*, 84 Md. 19. As already stated, the plaintiff had never been on the sidetrack, did not know of the location of the pole, and had never had his attention directed to it. As a passenger conductor, his duties were inside the train, except when at a station, and he did not therefore have the opportunity to observe the location of structures along the track which a freight brakeman, whose duties are on the outside of the train, or an engineer, whose attention is directed to objects outside of the train, would have. The only means of knowledge which he could have possessed was from observing it casually, if not busy with his duties, when passing it upon his train along the main track. The familiarity which he could acquire with it in this way was not such that it can be presumed that he had knowledge of its dangerous proximity to the track.

"We do not think that the common pleas division erred in excluding the testimony of Edward P. Dawley, a civil engineer in the employment of the defendant, as to other dangerous obstructions on the line of the railroad over which the plaintiff was accustomed to run his trains. It was not proposed to show in connection with it that the plaintiff had knowledge that these obstructions were dangerous, and for the reasons already stated we do not think that they were risks assumed by him as incident to the service. We think the instructions to the jury were sufficiently favorable to the defendant.

"New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict."

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**RAILROAD COMPANIES — NEGLIGENCE — DANGEROUS STRUCTURES—TELEGRAPH POLE—ASSUMPTION OF RISK.** A railroad company is liable to one of its employés for his injuries caused by coming in contact, during the performance of his duties, with a telegraph pole, signal post, or stump standing in dangerous proximity to the track: See monographic note to *Chicago etc. R. R. Co. v. Sweet*, 92 Am. Dec. 219, on the duty of an employer to furnish employés with safe means and appliances with which to work, and, generally, to provide for their safety. In *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54, a brakeman in the defendant's employ, descending the ladder of a moving freight-car, to throw a switch, was struck by a telegraph pole, standing only eighteen inches from the car, and killed. The pole had been suffered to remain in that position three years, but there was no evidence that the defendant put it there, or knew of its existence, and there was no evidence that the brakeman knew of it. It was held that an action of damages for the killing was maintainable. An employé does not assume the risk of peril from dangerous machines, appliances, or structures, unless he knows of the danger, or it is so obvious that he must be presumed to know it. Thus, a railroad company is liable to a brakeman injured by a signal post placed so near the track

that it knocked him off of a ladder on the side of a freight-car on which he was climbing, in the discharge of his duty, when he was unfamiliar with the road, and had not been informed of the existence of permanent structures so near the track as to make it dangerous to be in the place at which he was when hurt: *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733.

**EVIDENCE — NEGLIGENCE — RAILROADS.**—In an action against a railroad company for injury to a brakeman, caused by proximity to passing cars of a negligently constructed awning at a station, evidence is admissible of the proximity of awnings at other stations on the road: *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151.

**NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—A new trial will not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence would require a different verdict: *Linscott v. Orient Ins. Co.*, 88 Me. 497; 51 Am. St. Rep. 435.

## DENNIS v. JOSLIN MANUFACTURING COMPANY.

[19 RHODE ISLAND, 666.]

**EVIDENCE OF VOTE OF CORPORATION—WHAT IS BEST.**—The best evidence of the vote of a corporation is the recorded action of its stockholders or officers.

**CORPORATIONS—DIVIDEND—VOTE OF, SHOULD APPEAR ON BOOKS.**—The declaration of a dividend, being one of the most important acts of a corporation, and implying a corporate disposition pro tanto of its property, ought to appear upon the books of the company.

**CORPORATIONS — STOCKHOLDERS, AGREEMENT OF AND ITS EFFECT.**—The members of a corporation cannot, like the members of a copartnership, make an agreement among themselves informally. The corporation must act as a body.

**EVIDENCE—CORPORATIONS—VOTE OF DIVIDEND—PAROL PROOF OF.**—Parol evidence is inadmissible to show that a corporation voted a dividend as an offset to moneys withdrawn by some of its stockholders from the profits of the company, as the record should show what the corporation did.

**CORPORATIONS—DIVIDEND—REMEDY WHERE RECORD IS SILENT.**—If the record of a corporation fails to show what it did, in the matter of declaring a dividend, the remedy is to bring an appropriate proceeding to correct the record itself.

Bill in equity, against the Joslin Manufacturing Company, and others, for an injunction held on the pleadings and proof.

James M. Ripley and John D. Thurston, for the complainant.

William G. Roelker, for the respondents.

**637 STINESS, J.** This bill was filed to enjoin the defendant company from selling stock belonging to the complainant to satisfy a debt alleged to be due from him to the company.

The bill alleges that the three stockholders, composing the company at the time, had agreed that each might withdraw



money from the profits of the company to be offset by a dividend, to be declared at the following annual meeting, sufficient to cover the amounts withdrawn, in proportion to the stock owned by each, and that at the annual meeting in July, 1894, a dividend was so voted. The stockholders withdrew certain sums, and the amount drawn by the complainant constitutes the debt in question. The records of the company show no vote declaring a dividend, but, on the contrary, show an account of advances made to the stockholders. The complainant seeks to prove the vote declaring a dividend, by parol. The respondents, denying the dividend and relying upon the records, object to parol testimony to vary or supplement the records.

It is undoubtedly true, as a general rule, that the best evidence of the votes of a corporation is the recorded action of its stockholders or officers, although they are not conclusive evidence against a stranger or against a stockholder in an individual transaction between him and the corporation: 6 Thompson on Corporations, secs. 7731, 7734, 7739, 7740, and cases cited. But the claim here set up by the complainant is not an individual claim, but one in privity with the corporation and the other stockholders. The declaration of a dividend is one of the most important acts of a corporation. It is a disposition <sup>668</sup> pro tanto of its property. It clearly implies corporate action to that effect. It is action of such a character that it ought to appear upon the books of the company. A corporation is not a copartnership, where members can make an agreement between themselves informally, but it must act as a corporate body; and as corporations are now so numerous in all branches of business, we deem it to be highly important to require regularity and certainty in their proceedings, so far as mutual rights of stockholders are concerned. If the complainant is entitled to a dividend, the other stockholders are also entitled, and their right ought to be as plain as his. But suppose that we should admit parol evidence, and that, two of the three stockholders testifying to a dividend and the third denying it, the court should sustain the complainant's claim in this case. They would get the benefit of a dividend as an offset to their account. Suppose, also, that the third stockholder, having drawn nothing, should sue for his dividend, and, confronted by his testimony in this case, or unable to procure witnesses, a jury should believe that no dividend was made. He would get nothing. Two stockholders would receive a dividend and the third would not, and money would be taken from a company for

a dividend when its records failed to show that one had been declared. The possibility of such a result shows the unfitness of a rule allowing parol evidence as to a dividend. It is not hardship on a stockholder to refuse it, for his remedy is both simple and ample. He can take steps to correct the record, first in the corporation itself, by calling attention to the error that it may be corrected, or, where this will not avail, by mandamus to compel the secretary to do his duty as a recorder, or by a bill to correct the record. We confess, with some surprise, that we find no authority for either of these remedies; but we see no reason why mandamus should not apply to a case like this, as well as to the numerous cases of failure to perform ministerial duties, in which it has been so frequently allowed: See Angell and Ames on Corporations, 10th ed., sec. 707. Cases of errors in records must often have arisen, and probably the reason why we find no report of such cases lies in the fact <sup>669</sup> that ordinarily a majority which has the power to pass a vote also has the power to correct the record when there is an error. Without intending, therefore, to lay down a rule beyond the case before us, we decide that where, as in the matter of a dividend, members of a corporation have a common interest and right by virtue of action taken, the record should show what the corporation did, and in case of error the remedy should be by a proceeding to correct the record itself, rather than by parol evidence in collateral suits, which would be liable to different results.

It follows that the parol evidence offered in this case to show that a dividend was voted as an offset to advances is inadmissible.

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**CORPORATIONS—ACTION OF—EVIDENCE.**—The attitude of a corporation toward one of its members can be known only by its action as a corporation, and the only admissible evidence of such action is the record of the proceedings of the corporation itself: *Independent Order of Foresters v. Zak*, 136 Ill. 185; 29 Am. St. Rep. 318.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**SOUTH CAROLINA.**

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**KAUFMAN v. CAUGHMAN.**

[49 SOUTH CAROLINA, 159.]

**WILLS—SIGNATURES OF THE WITNESS MADE BEFORE THAT OF THE TESTATOR.**—If one of the subscribing witnesses to a will testifies that they signed it before the testator and the others that they signed it afterward, it may properly be received in evidence, for upon this conflicting testimony it is for the jury to determine which is true.

**WILLS—PRESUMPTION OF TESTAMENTARY CAPACITY.** It is not incumbent upon the proponent of a will to prove the sanity of the testator. If there is evidence of the formal execution of the will, including the attestation and subscription of the witnesses, as required by law, the presumption of testamentary capacity arises.

**WILLS—SIGNING BY TESTATOR AND BY WITNESSES, ORDER OF.**—The order of signing a will by the testator and the witnesses is not material, if substantially contemporaneous. Hence the fact that one of the witnesses signed before the testator does not invalidate the will, if all signed at the same interview, each immediately succeeding the other.

**WILLS.—THE DECLARATIONS OF A TESTATOR MADE AFTER THE EXECUTION** of his will are not admissible to prove undue influence, where there is no evidence of external acts having a tendency to control the free agency of the testator.

**WILLS—SANITY.—THE OPINION OF THE SUBSCRIBING WITNESSES** respecting the sanity of the testator at the time of the execution of the will is admissible in evidence.

**WILLS—DECLARATIONS OF TESTATOR, WHEN ADMISSIBLE.**—To rebut the idea of fraud or of undue influence or to show that the will is the result of the deliberate mind of the testator, his previous declarations, consistent with the will, are admissible in evidence.

**DEPOSITION—PRESUMPTION THAT WITNESS REMAINS OUT OF THE STATE.**—When it is shown that a witness reside out of the state when his deposition was taken, and there is nothing to indicate his return, his deposition may be received at the



trial six months later. There is no presumption that he has, in the mean time, ceased to be a resident of the state wherein his deposition was taken and become a resident of the state where the trial takes place.

**WILLS—DECLARATIONS OF TESTATOR IN SUPPORT OF.**—Declarations of a testator in conformity with the provisions of his will are admissible in proof of his assent.

**WILLS.—THAT A WILL IS UNJUST** to the testator's relatives and inconsistent with natural justice is not sufficient to justify a refusal to admit it to probate.

**WILLS—TESTATOR'S CAPACITY.—THE OMISSION OF A CHILD** of the testator from his will is no ground for impeaching his capacity.

Proceedings for the probate of the will of Mrs. Lucinda Drafts, deceased. It was admitted to probate, and the contestant appealed.

Meetze & Muller, for the appellant.

G. T. Graham and Andrew Crawford, contra.

<sup>163</sup> JONES, J. Mrs. Lucinda Drafts made a paper purporting to be her last will and testament on the nineteenth day of June, 1891, and soon thereafter, on the ninth day of September, 1891, died. This paper was admitted in probate in common form October 27, 1891. At the instance of the appellant, Mrs. Ella Caughman, the judge of probate for Lexington county required said will to be proven in solemn form of law, and after hearing the case, on the twenty-fifth day of October, 1894, filed his decree sustaining the will. On appeal therefrom to the circuit court, the cause was heard before Judge Ernest Gary and a jury, February term, 1896. On motion of the contestant, the proponent consenting, the following issues were referred to a jury for their finding: 1. Was the paper purporting to be the last will and testament of Mrs. Lucinda Drafts, deceased, legally executed? To which the jury responded, Yes. 2. Was there undue influence exercised over said Mrs. Lucinda Drafts to induce her to sign said instrument of writing? To which the jury responded, No. 3. Was the said Mrs. Lucinda Drafts of sound and disposing mind and memory at the time said paper is purported to have been executed? To which the jury responded, Yes. Whereupon Judge Gary made his decree adjudging <sup>164</sup> said findings to be satisfactory to the court, and sustained by the evidence adduced, and that said writing was the last will and testament of Mrs. Lucinda Drafts. The contestant now appeals to this court on the grounds set out in the report of this case.

As to the first ground of appeal. We do not think the circuit judge erred in allowing proponent to introduce the paper, which he was seeking to establish as the last will and testament of Mrs. Lucinda Drafts, deceased, in evidence at the termination of the examination in chief of the three subscribing witnesses, merely because one of them testified that the witnesses signed the will before the testatrix. The two other subscribing witnesses had testified that the testatrix signed first. So that, admitting that the order of signing was material, for the purpose of this particular exception, it was not error to allow the writing to go before the jury. Had the circuit judge ruled out the writing on this ground, he would, as he said, have taken from the jury the very question which the parties had agreed should be submitted to a jury; had he so ruled, he would have also invaded the province of the jury by deciding himself the question of fact in issue. In *Bauskett v. Keitt*, 22 S. C. 188, where two witnesses testified that they, with another person, naming him, had witnessed a will, and this other person denied it, it was held that it was properly left to a jury to be determined by them.

We do not find in the record that any objection was made to the introduction of the paper purporting to be the will, on the ground that one of the subscribing witnesses had failed to testify as to the mental capacity of the testatrix, hence the second part of exception 1 is not properly before us. We may say, however, that the objection, if it has been made, is untenable. The family physician of the testatrix, who was one of the subscribing witnesses, testified that she was mentally sound at the time of the execution of the will. This was not contradicted by either of the other subscribing witnesses, and, if it had been, <sup>165</sup> the question, like the question as to the order of signing, was for the jury. It is not incumbent upon the proponent of a will to prove in the examination in chief the fact of the testator's sanity by taking the opinion of the subscribing witnesses on that point. When proponent proves the formal execution of a will, including the attestation and subscription of the witnesses, as required by law, a presumption of testamentary capacity arises, since every adult is presumed sane until the contrary appears, and since witnesses when they attest and subscribe a will as such, not only attest the fact of the testator's signing, but also the testator's sanity: *Heyward v. Hazard*, 1 Bay, 349. In this case, proponent called all the witnesses to the will and placed them on the witness stand, and contestant had every opportunity to interrogate them as to

the testator's sanity. In *Welch v. Welch*, 9 Rich. 133, it was held that it was not necessary that each attesting witness should prove the signature of the testator; it is sufficient if it be proved by the other attesting witnesses. The same rule would apply on any other issue on the question of will or no will.

We will next consider the eighth and ninth exceptions, which raise the question whether the order of signing the will by the testatrix and the subscribing witnesses is material, so as to affect the validity of the will, when the signing by both testatrix and witnesses are substantially contemporaneous, and constitute one and the same transaction. The circuit judge charged the jury pointedly that the order of signing, under such circumstances, would not affect the validity of the will. In this case, two of the subscribing witnesses testified that the testatrix signed first, and then the witnesses signed; while one of the subscribing witnesses testified that the order of signing was just the reverse. So far as we are informed, there is no decided case in this state on this point, and there is quite a conflict in the decisions elsewhere. There is no doubt that under statute 1 Victoria, chapter 26, the courts of England held that the signature or acknowledgment of the testator <sup>168</sup> must precede the subscription by the witnesses: 29 Am. & Eng. Ency. of Law, 209; 1 Jarman on Wills, 138; 2 Curt. 865; 3 Curt. 117, 648. That statute provides: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." This statute clearly places more stress on the mere manner of executing wills than ours, and, by a very strict construction, it may be that the "signature" of the testator, which is required to be made or acknowledged in the presence of the witnesses, should be made or acknowledged before they attest. Our statute provides (Rev. Stats., sec. 1988): "All wills and testaments of real and personal property shall be in writing, and signed by the party executing the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said testator and of each other, by three or more creditable witnesses, or else they shall be utterly



void and of none effect." Under this statute, the witnesses attest not merely the signature of the testator, but they attest the will, which is not merely the paper containing a declaration of the testator's mind or will, but includes all the statutory requirements essential to constitute the writing a will. If it be asked, as Sir Herbert Jenner Fust asked in 2 Curt. 865, "Is the paper a will before it is signed by the testator? or if it is asked, Can witnesses attest a will before it is made? the answer is, the testator's signature does not make the will, and that there is no will until testator and witnesses have all signed. In acts substantially contemporaneous, it cannot be said that there is any substantial priority. The undisputed evidence was, that the paper was <sup>167</sup> signed by the testatrix and the witnesses, by each in the presence of all the others, on a piano in the parlor of Mrs. Drafts, in the same interview, each signing immediately after the preceding one. Before any one signed, the testatrix said, "Gentlemen, this is my will; will you witness it?" or words to that effect. Under such circumstances, the mere order of signing can make no sort of difference. No doubt, the usual and more orderly mode of executing a will is for the testator to sign first, and then the witnesses; but to hold that a mere change in the order of signing, accidentally or otherwise, would destroy the writing as a will, is to sacrifice substance for mere form. When the statute expressly, or by necessary inference, requires such formality, then nothing is left but to enforce it; but the court will not stress formalities which the statute does not. Our view is supported by a number of cases cited in 29 American and English Encyclopedia of Law, page 210, as follows: O'Brien v. Galagher, 25 Conn. 229; Sechrest v. Edwards, 4 Met. (Ky.) 163; Swift v. Wiley, 1 B. Mon. 114; Upchurch v. Upchurch, 16 B. Mon. 113; Miller v. McNeill, 35 Pa. St. 217; 78 Am. Dec. 333; Rosser v. Franklin, 6 Gratt. 1; 52 Am. Dec. 97. One of the leading cases in this country cited to sustain the contrary view is Chase v. Kittridge, 11 Allen, 57; 87 Am. Dec. 687. In this last-named case, a witness had signed before the testator signed, and in his absence. The real question in the case was, whether the witness could acknowledge his signature in the presence of the testator and thus comply with the Massachusetts statute requiring that witnesses to a will should subscribe in the presence of the testator. The court held that he could not. Quite a different question from the one presented here.

As to the second exception. Contestant desired to prove by the witness, A. Marks, a conversation had by witness with the testatrix some time after the execution of the will. When witness was asked to state what the conversation was, on objection raised, the question was ruled to be incompetent. It appears from the record that the <sup>168</sup> conversation sought to be proved was to this effect: "That Mrs. Drafts said she was not well, and spoke as if she thought she would not live long; witness said, 'Well, I suppose you have everything fixed and your business arranged'; she replied, 'No, I want to see Ella; Graham did not do her right.'" There was no error in ruling the question incompetent. In the first place, it does not appear to have any relevancy to any issue before the jury. In the second place, if the object was to show that some one exercised undue influence over the testatrix in the execution of her will, it is a well-settled rule of evidence that external acts of undue influence cannot be shown by the declarations of the testator after the execution of will. Such evidence is hearsay. As said by Thompson, J., in *Jackson v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390: "To permit wills to be defeated or in any manner whatsoever impeached by the parol declarations of the testator appears to me repugnant to the very genius and spirit of the statute, and not to be allowed": Schouler on Wills, sec. 243; 2 Wharton on Evidence, sec. 1010. After evidence of external acts, having any tendency to control the free agency of the testator, the testator's declarations may be evidence to show the influence such external acts had on the testator's mind. But we do not see how the evidence proposed relates to this matter, or how it would tend to show that the contents of the proposed will was not the free and unbiased dictates of the testatrix's mind when she signed the same.

The third ground of appeal cannot be sustained. A subscribing witness may give his opinion as to the sanity of the testator. In *Heyward v. Hazard*, 1 Bay, 349, the court said: "The business, then, of the persons required by statute to be present at executing a will is not barely to attest the corporal act of signing, but to try, judge, and determine whether the testator is compos to sign—that is, of a sound mind as every will, upon the face of it, imports": *Jeter v. Tucker*, 1 S. C. 245; 1 Greenleaf on Evidence, 440; Schouler on Wills, sec. 198.

<sup>169</sup> The fourth exception alleges error in permitting the testimony of S. P. Wingard, D. T. Barre, and S. P. Drafts as to the general mental capacity of Mrs. Lucinda Drafts, they not being

experts. In the case of the witness, S. P. Wingard, the record shows that this question was asked: "Q. She did—who managed her own affairs? A. She did herself, so far as— Objected to—not in reply." This objection was overruled. As to D. T. Barre, the record shows: "Q. What kind of mind and disposition did she have? Objected to—not in reply." Objection overruled. As to S. P. Drafts: "Q. Say whether or not she was intellectually, morally, or emotionally insane. Mr. Muller: We object; he is not an expert. Objection sustained." It is therefore manifest that there is no foundation in the record for this fourth exception.

As to the fifth exception. It is not well taken. To rebut the idea of fraud or undue influence, and to show that the will is the result of the deliberate mind of the testator, previous declarations of the testator consistent with the scheme of the will are admissible in evidence: Schouler on Wills, sec. 194; Means v. Means, 6 Rich. 14; McNinch v. Charles, 2 Rich. 236.

As to the sixth exception, alleging error in allowing the testimony of Mrs. Beeland, taken *de bene esse*, to be introduced without any showing that the witness was absent and without the jurisdiction of the court, we think it is not tenable. There was substantial compliance with the requirements of section 2347 of the Revised Statutes regulating such testimony. The notice, the affidavit of the proponent, and the certificate of the notary public all show that the witness resided in Macon, Georgia, in August, 1895, and the trial was in February, 1896. There was nothing to suggest to the court that the witness was not then out of the state, and, in the absence of a contrary showing, the presumption was that the witness was then in the state of Georgia, her place of residence.

The seventh exception charges error in allowing the letters 170 of Mrs. Lucinda Drafts to Mrs. Beeland to be introduced and read in evidence. These letters were introduced to show the assent of the testator to the provisions of the will. In McNinch v. Charles, 2 Rich. 238, the court said: "Proof of previous declarations, in conformity with the provisions of a will, are constantly received in evidence in proof of the assent of testator. That such declarations are in writing gives them additional effect, as indicating a deliberate purpose and excluding misapprehension of their import."

There was no error in refusing to charge the request to charge embodied in the tenth, eleventh, and twelfth exceptions. So far



as the exceptions refer to the reasons assigned by the circuit judge for refusing the requests we do not consider them, because the reasons assigned were mere memoranda made by the judge on the paper containing the requests, were not spoken or read in the hearing of the jury, and constituted, therefore, no part of his charge.

There is no such doctrine here that a will must not be inconsistent with natural justice and must not be unequal. It would be very unnatural justice if a testator of sound mind and free will could not do as he pleases with his own property. As held in *Lee v. Lee*, 4 McCord, 183, 17 Am. Dec. 722, "the law puts no restrictions upon a man's right to dispose of his property in any way his partialities or pride or caprice may prompt him"; and it was further held that (because) a will is unjust to one's relations is no legal reason that it should be considered an irrational act.

The mere omission of a child from a will of itself is not ground for impeaching the testator's capacity: *Kirkwood v. Gordon*, 7 Rich. 474; 62 Am. Dec. 418. Besides involving an unsound proposition of law, the requests to charge involve a charge in respect to facts, since it was the jury's province to say whether the proof of capacity and violation was strong enough to sustain the will, or whether the proof of undue influence or fraud was sufficient to set it aside.

<sup>171</sup> For similar reasons the thirteenth exception is also overruled.

We find no error of law in this case. The verdict of the jury and the concurring decree of the circuit judge are abundantly supported by this evidence.

The judgment of the circuit court is affirmed.

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**WILLS—ATTESTATION—ORDER OF SIGNING.**—In the attestation of a will, the order of signing is immaterial so long as the signing by the witnesses and testator was all done at the same moment and in the same presence. The English law is more exacting than ours, hence the decisions under it are not authority here: *Miller v. McNeill*, 35 Pa. St. 217; 78 Am. Dec. 333. Contra, monographic note to *Guthrie v. Owen*, 36 Am. Dec. 319.

**WILLS—PROVING UNDUPLICATE INFLUENCE—UNJUST DISTRIBUTION OF PROPERTY.**—An unequal distribution of his property by a testator, or his omission entirely from his bequests of some of his next of kin, is not in the absence of mental incapacity or undue influence, evidence to show either testamentary incapacity or undue influence: *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33, and note. See *Berberet v. Berberet*, 131 Mo. 399; 52 Am. St. Rep. 634, and note.

**WILLS—UNDUE INFLUENCE OR INCAPACITY—EVIDENCE—DECLARATIONS OF TESTATOR.**—Statements made by a testator after its execution, to the effect that he did not make the will and did not know what was in it, that he wanted to give a particular heir as much as the others, and did not feel safe if he made another will, are not admissible to impeach his will: *In re Kaufman*, 117 Cal. 288; 59 Am. St. Rep. 179, and note. Declarations made by a testator to a legatee prior to the execution of his will, concerning the disposition to be made of his property, may be testified to by a contestant of the will who took no part in the conversation in which such declarations were made. Such evidence is admissible to show whether the will was procured by undue influence or not: *Estate of Goldthorp*, 94 Iowa, 336; 58 Am. St. Rep. 400, and note. See *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and monographic note; *Lane v. Moore*, 151 Mass. 87; 21 Am. St. Rep. 430, and note.

**WILLS—PRESUMPTION OF TESTAMENTARY CAPACITY.**—The presumption of law is in favor of testamentary capacity: Note to *Waddington v. Buzby*, 14 Am. St. Rep. 711.

**DEPOSITIONS—ADMISSIBILITY IN EVIDENCE.**—If depositions are properly taken a short time before a trial, on the ground that the witness is about to depart from the jurisdiction of the court, they may be admitted in evidence without proof that he cannot be brought to testify in person: *Hennessey v. Niagara Fire Ins. Co.*, 8 Wash. 91; 40 Am. St. Rep. 892, and note. See *Jackson v. Rice*, 3 Wend. 180, 20 Am. Dec. 683, for a contrary view.

## STATE v. RICE.

[49 SOUTH CAROLINA, 418.]

**EVIDENCE.—THE DOCKET OF A TRIAL JUSTICE** is, in South Carolina, the highest and best evidence of proceedings before him in a criminal cause. It is, therefore, error to reject such docket on the ground that the warrant and other papers in the cause must be produced, or their loss proved.

**EVIDENCE, HEARSAY.—STATEMENTS MADE BY A PROSECUTRIX** the next morning after her receiving a whipping, telling who whipped her, are hearsay, and therefore inadmissible.

**EVIDENCE OF GOOD CHARACTER OF WITNESS, WHEN INADMISSIBLE.**—Though testimony has been received tending to prove that a witness has made contradictory statements, he cannot be supported by evidence of his good character.

**EVIDENCE OF ONE CONSPIRATOR, WHEN NOT ADMISSIBLE AGAINST ANOTHER.**—Declarations or admissions of one conspirator made after a criminal conspiracy has been consummated are not admissible as evidence against another.

Sims & Dixon and Munro & Munro, for the appellant.

T. S. Sease and O. L. Schumpert, contra.

**418** McIVER, C. J. The defendants were indicted for assault and battery with intent to kill, and the jury having found the defendants guilty of a high and aggravated assault and bat-

tery, they were sentenced accordingly. From this judgment the defendants appeal upon the several grounds set out in the record, which will be considered in their order, grouping, however, those which present the same question.

The allegations on the part of the state, to which the <sup>419</sup> testimony was directed, was that on the 7th day of May, 1896, late in the night of that day, a party of disguised men took the prosecutrix, one Mary Ann Wallace, from her house into the woods, and there inflicted upon her a severe whipping; and the only question in the case seemed to be whether the defendants were the persons who committed this outrage.

One Rufus Farr was offered as a witness for the prosecution, and when he came to the book to be sworn, counsel for defendants interposed an objection that the witness was incompetent to testify, on the ground that he had been convicted of larceny before a trial justice, and offered to introduce the book kept by the trial justice to prove that he had been convicted of an infamous offense. Upon objection from the solicitor that the book was not the highest and best evidence, but that the original records—the warrant and other papers—must be produced, or their loss established, the circuit judge, his honor, Judge Witherspoon, sustained the objection, holding that the book of the trial justice was only secondary evidence, and could not be received, in the absence of any satisfactory showing as to the loss of the original papers, and he therefore allowed the witness, Farr, to testify. This ruling is made the basis of the first, second, and sixth exceptions, which present the question whether the book of the trial justice was primary or merely secondary evidence of the fact that the witness offered had been convicted of the offense of larceny. This ruling of the circuit judge in this case is in conflict with the authorities, and cannot, therefore, be sustained. In *Cherry v. McCants*, 7 S. C. 224, it was held that the book which a trial justice is required by statute to keep is the highest and best evidence of proceedings had before him, either in criminal or civil cases. That was an action for malicious prosecution in a trial for petty larceny before a trial justice, in which it, of course, became necessary to prove the proceedings before the trial justice, and it was there held that the book was the best evidence of such proceedings. In the opinion in that case we find the following <sup>420</sup> language: "As the court of a trial justice has no clerk, and as he himself is the keeper of the papers connected with his office, not required to be turned over to the



solicitor for the circuit in which he resides for further action, to put at rest all doubts as to the mode in which the proceedings in his court may be offered in evidence in any of the courts where proof of such proceedings may be competent, we are prepared to say that his book, so required by law to be kept, either relating to criminal or civil business had before him, as the case may be, shall be sufficient." That case had been recognized and followed in at least two subsequent cases: *Barron v. Dent*, 17 S. C. 80; *Caulfield v. Charleston*, 19 S. C. 601. Indeed, the court, in *Cherry v. McCants*, 7 S. C. 224, simply adopted the construction which had been placed by the former court of appeals upon a provision in the act of 1839 identical in terms (so far as this particular matter is concerned) with our present statute upon the subject (1 Rev. Stats. 1893, sec. 892), in the case of *Etters v. Etters*, 11 Rich. 413. It is true that the case last cited was subsequently modified in the case of *Traylor v. McKeown*, 12 Rich. 253; but only to the extent of allowing a constable or other officer, when sued for a trespass in enforcing an execution issued by a magistrate, to defend himself by introducing the execution under which he acted. In view of these authorities, we are compelled to sustain the first, second, and sixth exceptions.

The third exception imputes error to the circuit judge in permitting a witness for the state, Ed. Wallace, to testify that the prosecutrix told him the morning after the whipping who it was whipped her. This was clearly hearsay and incompetent, and this exception must be sustained.

The fourth exception alleges error in permitting the solicitor, against the objections of defendants, to prove in reply by sundry witnesses the good character of the witness, John D. Norris, whose general character had not been assailed in the testimony for the defense, though testimony had been offered to show that said Norris had made contradictory <sup>421</sup> statements, and in that way it was sought to discredit his testimony. Under the general rule, as laid down by standard textwriters on evidence, such testimony would have been competent; but the rule in this state is otherwise: See *Chapman v. Cooley*, 12 Rich. 654, recognized in the recent cases of *State v. Jones*, 29 S. C. 230, and *State v. Wallace*, 44 S. C. 361. The syllabus in the case of *Chapman v. Cooley*, 12 Rich. 654, which correctly represents the point decided, reads as follows: "The character of a witness can be defended by evidence only when it is directly assailed by evidence;

when, therefore, a witness is attacked by evidence of previous statements in conflict with his deposition, evidence of his general good character is inadmissible." In that case, that distinguished jurist, Mr. Justice F. H. Wardlaw, after showing that the rule as laid down by the textwriters, and apparently approved by Earle, J., in *Farr v. Thompson*, Cheves, 37, is based upon a misconception of the case of *Rex v. Clarke*, 2 Starke, 241, upon which the rule was based, proceeds to draw a distinction between the character of a witness and the credit which should be allowed his testimony, and says: "Every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation," and proceeds to lay down as the true rule that which is stated in the syllabus copied above. Common experience shows that the distinction thus taken is well founded, for there are persons of unimpeachable character, whose testimony is not always entitled to very much credit, arising from carelessness, imperfect memory, or other causes not involving any want of character. At all events, this being the rule in this state, as settled by the highest authority, and recently recognized, it must be followed, and hence the fourth exception must be sustained.

The fifth exception, which imputes error in refusing to allow the witness, Gordon Williams, to answer the question whether Rufus Farr, the witness above spoken of, had an alias or not, and whether Rufus Farr and Rufus Salter were <sup>422</sup> not one and the same person, loses all of its practical importance in view of the fact that Rufus Farr when on the stand admitted that he was sometimes called Rufus Salter. Besides, if this witness was incompetent to testify, by reason of his conviction of larceny, which, as we have seen, was sufficiently shown by the book of the trial justice, the question becomes immaterial.

The only remaining question is that presented by the seventh exception, in which the error imputed is in admitting the declaration or admissions of John Rice to the witness, Norris. John Rice was not a party to the case, and, therefore, his declarations or admissions were clearly hearsay, and therefore incompetent. The only way in which his declarations or admissions could become competent was by first showing that the offense charged was committed in pursuance of a conspiracy to which John Rice was a party, and that such declarations or admissions were made while such conspiracy was in progress. Now, in the first place, there does not seem to be any evidence of any such

conspiracy to which John Rice was a party; but even conceding that there was, it is clear that these declarations or admissions were inadmissible, for the witness, Norris, himself says that they were made after the object of the alleged conspiracy was accomplished—after the woman had been whipped—and this is sufficient to show that such declarations were incompetent: See *State v. Green*, 40 S. C. 328, 42 Am. St. Rep. 872, where it was held that after a conspiracy is ended by the accomplishment of the common enterprise, the declarations of one of the conspirators is not evidence against the others. The seventh exception must likewise be sustained.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

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**CONSPIRACY—EVIDENCE—DECLARATIONS.**—Acts and declarations of a co-conspirator after the consummation of the conspiracy are admissible only against the person doing the act or making the declaration: *Conde v. State*, 35 Tex. Crim. Rep. 98; 60 Am. St. Rep. 22; *Hunter v. Commonwealth*, 7 Gratt. 641; 56 Am. Dec. 121.

**EVIDENCE OF CHARACTER IN CIVIL AND CRIMINAL CASES** is discussed in the note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 133, 134. The fact that the testimony of a witness is contradicted does not authorize the party calling him to offer evidence that his general reputation for truth is good. Such evidence is admissible only when the opposite side has attempted to impeach his general reputation: *Atwood v. Dearborn*, 1 Allen, 483; 79 Am. Dec. 755, and note. See *George v. Pilcher*, 28 Gratt. 299; 26 Am. Rep. 350; *Chess v. Chess*, 1 Penr. & W. 32; 21 Am. St. Rep. 350, and note.

**EVIDENCE—JUSTICE'S DOCKET.**—The docket is the best evidence of a judgment, but, if it has not been entered, the minutes or memoranda of the justice, made at the time of giving judgment, and filed with the papers in the cause, are, when proved by the justice, competent evidence of the judgment: *Hickey v. Hinsdale*, 8 Mich. 267; 77 Am. Dec. 450, and note. See *Townslly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181; 41 Am. Dec. 97.

**EVIDENCE—HEARSAY.**—The admission of hearsay evidence is forbidden by a general rule of evidence: *Lynch v. Postlethwaite*, 7 Mart. 69; 12 Am. Dec. 495; *Walker v. Forbes*, 25 Ala. 139; 60 Am. Dec. 498; *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551. For examples of hearsay evidence, see *Reinhart v. Miller*, 22 Ga. 402; 63 Am. Dec. 506; *People v. Alkin*, 66 Mich. 460; 11 Am. St. Rep. 512.



**MILLER v. FARMERS' BANK.**

[49 SOUTH CAROLINA, 427.]

**DOWER, RELEASE FROM RENUNCIATION OF.**—One who purchases a mortgage to relieve a wife who joined therein from her renunciation of dower, but who presents it in a suit to foreclose prior mortgages, informing no one of his intended release, and who executes no release in writing, cannot be regarded as releasing such wife, and a sale in such foreclosure proceedings carries her right of dower, though the proceeds are not sufficient to pay any part of the mortgage so purchased, and the other mortgages were not executed by the wife.

**DOWER—ENCUMBRANCES EXISTING BEFORE MARRIAGE.**—If, prior to a man's marriage, he has executed encumbrances against his real property under which a subsequent judicial sale is made, his wife is bound by such sale, and whatever rights she has in the property are transferred to the surplus proceeds after the payment of such encumbrances.

**DOWER—ENCUMBRANCES EXECUTED BY A HUSBAND.** If, after his marriage, a husband executed encumbrances upon his real property, his wife's right of dower is not affected thereby. If a judicial sale be made thereunder, realizing more than sufficient to satisfy the encumbrances, she has no interest in the residue, but after his death she can have dower assigned her in the land itself.

**DOWER—JOINDER OF WIFE IN ENCUMBRANCES.**—If, during coverture, a husband executes a mortgage upon which his wife renounces dower, and the mortgage is foreclosed during coverture, she is by her act deprived of her right to claim dower in the land so mortgaged.

**DOWER—FORECLOSURE WITHOUT MAKING A WIFE A PARTY.**—If a wife has joined in a mortgage executed by her husband, thereby renouncing her dower, she is not a necessary party to a suit to foreclose such mortgage, and after his death has no right to dower in the land.

**DOWER—FORECLOSURE OF SEVERAL MORTGAGES IN SOME OF WHICH THE WIFE DID NOT JOIN.**—If several mortgages are foreclosed in the same suit, in one only of which the wife joined, she is not, after the death of her husband, entitled to relief as against the purchaser on the ground that her renunciation of dower applied to one mortgage only. The purchaser is regarded as succeeding to the right of the mortgagor, although the proceeds of the sale were not sufficient to satisfy the mortgages in which she did not join, and the mortgagor in whose favor she renounced received nothing.

The decree or opinion of the circuit judge referred to in the opinion of the supreme court was as follows:

"This is an action brought by Fannie R. Miller, plaintiff, against the Farmers' Bank of Edgefield, South Carolina, defendant, in the probate court for Edgefield county, claiming dower in two tracts of land described in the complaint, of which the said defendant bank is now the owner. The case was heard, and the probate judge decreed that Fannie R. Miller, plaintiff, was entitled to dower. From the decree rendered by the said

court the defendant bank appeals to this court on various grounds, which are covered by this decree. I find from the statement of facts agreed upon by the attorneys representing the plaintiff and defendant, that E. J. Miller, the husband of the plaintiff, Fannie R. Miller, gave J. A. De Vore a first mortgage on the two tracts of land in which dower was claimed by the plaintiff, and on which mortgage no dower was renounced; that E. J. Miller gave a second mortgage to the Farmers' Bank of Edgefield, South Carolina, on the same two tracts of land, on which mortgage no dower was renounced; and that E. J. Miller gave a third mortgage to the Bank of Edgefield, which mortgage was transferred to D. E. Lanham, on the same two tracts of land, and on which mortgage dower was renounced by the plaintiff, Fannie R. Miller, the widow of E. J. Miller, deceased. I find from a judgment-roll introduced in evidence, entitled "The Farmers' Bank of Edgefield, S. C., plaintiff, against E. J. Miller, J. A. De Vore, D. E. Lanham, J. D. Atkinson, and Brigham & Brigham, defendants," that an action was brought by the Farmers' Bank of Edgefield, South Carolina, second mortgage creditor, to foreclose its mortgage, to which proceeding of foreclosure all the mortgage and judgment creditors of E. J. Miller, mortgagor, were made parties defendant. That J. A. DeVore, first mortgage creditor, and D. E. Lanham, assignee of the Bank of Edgefield's mortgage, third mortgage creditor, answered the complaint for foreclosure, and asked that their mortgages might be foreclosed and the proceeds applied to the payment of the several mortgages given by the said E. J. Miller, according to their legal priorities, and joined in the prayer of the complaint for foreclosure, and that a decree of foreclosure was rendered, providing for the payment of said mortgages according to their legal priorities, and that a sale of the said mortgaged premises took place in the lifetime of E. J. Miller, mortgagor, and bought by the said defendant bank. I also find that the proceeds of said sale were not sufficient to pay the second mortgage in full, and hence nothing was paid on the D. E. Lanham third mortgage, on which the widow's dower was renounced. I find also that D. E. Lanham testified before the probate court, which was objected to by defendant's counsel, that he had bought the Bank of Edgefield mortgage for the purpose of releasing the plaintiff's renunciation of dower on said mortgage, and that he told plaintiff that he had released plaintiff's dower on said mortgage, but that he gave no notice to anybody but his sister, the plaintiff herein,

that he had done so. The testimony conclusively shows that the answer of D. E. Lanham to the complaint for foreclosure, herein referred to, sets forth that he was the owner of the mortgage transferred to him by the Bank of Edgefield, and nowhere states that he did not claim any benefit from the renunciation of dower on his mortgage; that he did not so state in his testimony before the master, where his mortgage was proved; that he did not give any notice for himself or his sister, the plaintiff herein, and that no notice was given by anybody for him or the plaintiff, on the day of the sale of the mortgaged premises, that D. E. Lanham had released the plaintiff from her renunciation of dower on his mortgage, or that dower was claimed by the plaintiff in the mortgaged premises. I find also from the testimony that neither the original mortgage nor the record of it in the clerk's office shows that D. E. Lanham had released the plaintiff from the renunciation of dower or that he had canceled it in any way, but that D. E. Lanham had only verbally told the plaintiff, and no one else, that he had released her renunciation of dower.

"I hold, from the above state of facts, which are not disputed, as matter of law, that where there is a foreclosure and sale of mortgaged premises upon a mortgage valid against the wife, the result is to divest her of all claim upon the land, and compel her to look to the surplus proceeds of the sale, if any remain after satisfying the mortgage debt, and if there are no surplus proceeds of sale after satisfying the mortgage debt, the widow's dower is gone, where the wife voluntarily makes herself a party to a mortgage by her renunciation, and thereby having disposed of the surplus proceeds of sale, her claim of dower is gone; when the wife relinquishes her claim of dower on a mortgage in the manner prescribed by statute, the purchaser under a decree for foreclosure and sale would take a title absolutely unencumbered of the dower. The relinquishment would attend the deed of the husband to the purchaser as a muniment of title. The purchaser holds under the parties to the mortgage, viz., the mortgagor, mortgagee, and the wife herself; it is well-settled law that if a direct suit had been brought by D. E. Lanham, third mortgage creditor, with the dower of the plaintiff renounced on his mortgage, and no money was paid on the said mortgage, as the facts here show, the plaintiff's dower would have been gone. I can see no difference between a direct suit on the D. E. Lanham mortgage to foreclose it and the case at bar, so far as the dower of the plaintiff is concerned. It makes no difference who brings



the suit for a decree of foreclosure, based on the proceedings for foreclosure hereinabove, and in this decree referred to was a foreclosure of all the mortgages given by E. J. Miller, mortgagor. It was as much a sale under the D. E. Lanham mortgage, on which dower was renounced, as under those mortgages on which there was no dower renounced. Being a sale under all the mortgages, and the third mortgage, on which dower was renounced, not being satisfied, nor any part thereof, the dower of the plaintiff in the money is gone, as well as in the land itself. Her dower was sold at said sale for the benefit of the third mortgage, owned by D. E. Lanham, and if anybody is entitled to her dower money, D. E. Lanham is.

"The purchaser, the defendant bank, in this case, at said sale, bought all the rights, titles, and interests of E. J. Miller, mortgagor, J. A. De Vore, mortgagee, the Farmers' Bank of Edgefield, South Carolina, mortgagee, D. E. Lanham, mortgagee, and the widow's dower, which was sold under the D. E. Lanham mortgage, being renounced thereon, in the two tracts of land described in the complaint, and in which the plaintiff claims dower. So far as the satisfaction of the D. E. Lanham third mortgage is concerned, the result is the same as if a direct suit had been brought on the said mortgage to foreclose it, for the proceeds of sale would belong to the oldest mortgage in preference to it, the lands sold not bringing enough to satisfy it. These views are fully sustained in the following cases: *Keith v. Trappier*, Bailey Eq. 63-66; *Keckley v. Keckley*, 2 Hill Eq. 252; *Richard v. Talbird*, Rice Eq. 170; *Wiltsie on Mortgage Foreclosure*, 850; 5 Am. & Eng. Ency. of Law, p. 902; 2 Jones on Mortgages, 601, sec. 1693; *Grant v. Jackson etc. Co.*, 5 Del. Ch. 412; *Boorum v. Tucker*, 51 N. J. Eq. 135; *Chilver v. Weston*, 27 N. J. Eq. 534; *Carter v. Walker*, 2 Ohio St. 339; *Roan v. Holmes*, 32 Fla. 295; *Mandel v. McClare*, 46 Ohio St. 407; 15 Am. St. Rep. 627. It appears from the decree of the probate court that dower was allowed the plaintiff on the grounds that the renunciation of dower by the plaintiff on the D. E. Lanham or third mortgage was for the benefit of that mortgage alone, and only postponed to the satisfaction of that mortgage; and as said mortgage was not satisfied out of the proceeds of sale of the two tracts of land in which dower was claimed, that then the dower remained intact, and the purchaser at said sale only acquired the rights of the first and second mortgage creditors, and not those of the third mortgage creditor, which I have already held to be erroneous.

“While it nowhere appears in said decree that dower was allowed the plaintiff on the ground that D. E. Lanham, owner of the third mortgage, on which dower was renounced, had released the plaintiff’s dower from the operation of his mortgage, yet, as the question was made before me on argument at the hearing of the appeal, I will now consider the legal effect that such a release has upon the questions arising in this case. It appears from the testimony that D. E. Lanham, owner of the third mortgage, on which dower was renounced by the plaintiff, answered the complaint for foreclosure (referred to in this decree), as the owner of the said mortgage, in which answer no mention was made that the dower of the plaintiff had been released from his mortgage; proved his mortgage before the master with no mention made of the release of the plaintiff’s dower; did not make any entry upon the original mortgage or the record of the same in the clerk’s office that the plaintiff’s dower had been released; gave no notice to anybody before or at the sale that he had released the plaintiff’s dower, and the only evidence that he had done so was what he stated to her verbally, which was not known to anyone but him and her, until after this suit for dower was commenced. I hold that D. E. Lanham, third mortgage creditor, on whose mortgage dower was renounced, was the owner of said mortgage with dower renounced as legally and effectually, so far as the purchaser is concerned, at the sale under said foreclosure proceedings, the same as if no verbal statements had been made by him to the plaintiff that said dower was released. The two tracts of land on which dower is claimed were advertised for sale in the manner required by law, and the plaintiff having notice of said sale, gave no notice that her dower had been released from the D. E. Lanham mortgage, when it was her legal duty to do so, so as to affect a purchaser at said sale, she having renounced her dower on said mortgage, and nothing appeared to the contrary. The law is plain that in ordinary cases that the widow is not bound to give notice of her dower claim, for the law puts everybody on notice of such a right on the part of the widow, unless she has done something which would lead the purchaser to believe that she has renounced her dower. Here the widow had put on the Lanham mortgage her renunciation of dower, which was on record, and was presumed in the knowledge of the purchaser, who had a right at such sale to act upon such a state of facts which the records showed, which facts she cannot now controvert to the defendant’s injury. For to hold

otherwise would open the door to numerous frauds on purchasers at said sales. A mere verbal release by D. E. Lanham of the relinquishment of dower of the plaintiff from his mortgage, unknown to the world and unaccompanied by any acts or declarations or notice, is not sufficient to release the relinquishment of dower on said mortgage so as to affect the purchaser at a judicial sale, such as took place under the proceedings above referred to. Since said sale, D. E. Lanham and Fannie R. Miller, plaintiff herein, are estopped by the laches, silence, and conduct from claiming that the plaintiff's dower had been released. This doctrine is supported by the following cases: *Bigelow on Estoppel*, 501, note 511; 578; 2 *Scribner on Dower*, 251-253; *Phinney v. Johnson*, 13 S. C. 28; *Stoney v. Bank of Charleston*, 1 *Rich. Eq.* 275; *Hill v. Gray*, 45 S. C. 91.

"It is, therefore, ordered, adjudged, and decreed that the appeal of the defendant, the Farmers' Bank of Edgefield, South Carolina, be, and the same is, hereby, sustained, and that the decree of the probate court in the said case, decreeing that the plaintiff, Fannie R. Miller, is entitled to dower in the tracts of land described in the complaint, be, and the same is, hereby, reversed, vacated, and set aside, and that the complaint of the plaintiff be dismissed with costs."

Sheppard Brothers, for the appellant.

Folk & Folk, contra.

434 GARY, J. The facts of this case are fully set out in the decree of the circuit judge, which will be incorporated in the report of the case. The first, second, third, sixth, and seventh exceptions all depend upon the question of fact, whether the petitioner's renunciation of dower, on the mortgage assigned to D. E. Lanham, had ceased to be operative by his action. These exceptions are as follows: "1. Because his honor, the circuit judge, erred in holding that it was the legal duty of the plaintiff to give notice that her dower had been released from the D. E. Lanham mortgage so as to affect a purchaser at said sale; 2. Because his honor, the circuit judge, erred in holding that 'a mere verbal release by D. E. Lanham to the relinquishment of dower of the plaintiff from his mortgage, unknown to the world, and unaccompanied by any acts, declarations, or notice, is not sufficient to release the relinquishment of dower on the said mortgage, so as to affect a purchaser at a judicial sale, such as took place under the proceedings above referred to'; 3. Because



his honor, the circuit judge, erred in holding, that 'since said sale D. E. Lanham and Fannie R. Miller, plaintiff herein, are estopped by laches, silence, and conduct from claiming that the plaintiff's dower had been released'; 6. Because his honor, the circuit judge, erred in not holding that the renunciation of dower on the third mortgage inured to the benefit of the owner of that mortgage only; and that the owner of that mortgage had the right to release the wife from her renunciation, without the consent of or notice to any other person; 7. Because the probate judge having found as a fact that D. E. Lanham, the owner of the third mortgage, had released the wife from her renunciation of dower, and there being no testimony to the contrary, the circuit judge erred in not holding that she was thereby restored to <sup>435</sup> her inchoate right of dower as fully and as effectually as if she had never executed such renunciation."

The only testimony in the case touching this question is that of D. E. Lanham, which is as follows: "D. E. Lanham, sworn. Witness bought the mortgage from the Bank of Edgefield to relieve Mrs. Miller from the effect of her renunciation of her dower thereon. (Objected to by counsel for defendant. Objection overruled.) Witness informed Mrs. Miller that he had purchased the mortgage from the Bank of Edgefield, and that she was released from her renunciation of dower. The witness paid the money to the Bank of Edgefield, but Mrs. Miller furnished a part of the money. (The court excludes the statement of witness that Mrs. Miller paid part of the money to the Bank of Edgefield. Objected to by attorney for plaintiff.) Cross-examined. Witness says he has not got the mortgage to the Bank of Edgefield with him, and is not certain whether he has it or Governor Sheppard. Governor Sheppard had the mortgage at the time suit was brought by the Farmers' Bank, and during the pendency of the said suit. Witness don't recollect whether he was present before the master when his claim was approved or not. That he did not state to the master before or at the sale that he had released Mrs. Miller from the effect of the renunciation of dower. Witness says he had told no one else except his sister that he had released her from the mortgage, but his brother, P. B. Lanham, was present and knew the facts. Reply. Witness would not have bought the mortgage, except for the purpose of relieving his sister from her renunciation of her dower thereon, and Messrs. Sheppard advised to do so. (Objected to by attorneys for defendant. Testimony admitted.) Mrs. Miller is witness' sister;

she is the plaintiff herein." None of the exceptions raise the question that there was error in excluding the statement of witness that Mrs. Miller paid part of the money to the Bank of Edgefield. The testimony fails to show that there was an agreement between D. E. Lanham and Mrs. Miller <sup>436</sup> by which her renunciation of dower became inoperative. Having reached this conclusion, the other questions raised by said exceptions are merely speculative, and, therefore, will not be considered by this court.

The fourth and fifth exceptions will be considered together, and are as follows: "4. Because his honor, the circuit judge, erred in holding, as applicable to this case, 'that where there is a foreclosure and sale of mortgaged premises upon a mortgage valid against the wife, the result is to divest her of all claim upon the land, and compel her to look to the surplus proceeds of the sale, if any remain, after satisfying the mortgage debt; and if there is no surplus proceeds of sale, after satisfying the mortgage debt, the widow's dower is gone'; 5. Because his honor, the circuit judge, erred in holding as erroneous the judgment of the probate judge that the renunciation of dower by the plaintiff on the D. E. Lanham or third mortgage, was for the benefit of that mortgage alone, and only postponed the satisfaction of that mortgage."

From the decisions rendered by the court of last resort in this state, the following principles are deduced:

1. If, at the time of coverture, there are encumbrances on the land, and there is a judicial sale of the land during coverture to satisfy such encumbrances, the wife is regarded as in privity of the estate with her husband, and whatever rights she may have are transferred to the surplus proceeds of sale after payment of the encumbrances; but she has no right to have dower set off to her in the land thus sold.

2. If, at the time of, or during coverture, the title of the husband is complete and unencumbered, and he afterward mortgages the land, the wife is not a privy in estate with her husband, and her right to claim dower in the land is paramount to that of the mortgagee. In such case, her rights are not transferred to the surplus proceeds of sale if the mortgage is foreclosed during <sup>437</sup> the lifetime of her husband, but, after his death, she can have dower assigned her in the land itself.

3. If the title of the husband is complete, and, during coverture, he executes a mortgage on the land upon which the wife renounces her dower, and the mortgage is foreclosed during cov-

verture, she, by her own act, did that which as effectually deprives her of the right to claim dower in the land as if the mortgage had been executed for the purchase money of the land, or had been a subsisting lien at the time of marriage. In all these cases the rights of the purchaser are paramount to the wife's claim of dower. When the wife renounces dower in the land she, by her own act, places herself in privity of estate with her husband.

4. In cases where the rights of the wife are in privity with those of her husband in the land, and the land is sold under a judgment of foreclosure during coverture, the wife is not a necessary party to foreclosure proceedings, and after the death of her husband, has no right to claim dower in the land.

5. When a wife renounces dower on one mortgage, and there are other mortgages, as in this case, under all of which the land is sold during coverture, the wife, after the death of her husband, is not entitled to relief against the purchaser of the land on the ground that the renunciation of dower was for the benefit alone of that mortgage upon which the dower was renounced, and only postponed the satisfaction of that mortgage. The purchaser must be regarded as succeeding to all rights of the parties to the action and of the wife, who cannot dispute his title. This court is fully satisfied, by the reasoning of the circuit judge and the authorities cited in his decree, that the land was sold under all the mortgages aforesaid. The fourth and fifth exceptions are also overruled.

The eighth exception is too general for consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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**DOWER—WHEN BARRED BY CONVEYANCE OR ENCUMBRANCE.**—If lands are sold by an unmarried man, his subsequent marriage does not create any right to dower therein, though they are not conveyed to the purchaser until after the vendor's marriage: *Chapman v. Chapman*, 92 Va. 537; 53 Am. St. Rep. 823. Where, in a conveyance by a husband, the signature and seal of the wife are affixed, but her name is not otherwise mentioned in the deed, she does not thereby bar her right of dower: *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56, and note. Such right will not be barred by a supposed intention not manifested by the words of the deed: *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685, and note. But a mortgage signed and acknowledged by the wife of a mortgagor, containing apt words waiving her right of homestead and dower, is binding upon her, although her name does not appear in the granting clause: *Davis v. Jenkins*, 93 Ky. 353; 40 Am. St. Rep. 197.

**DOWER—RELEASE OF BY MORTGAGE—FORECLOSURE.**—A widow's dower is barred, as against the mortgagee, and so far as is necessary for the payment of the mortgage debt, where she joined with her husband in the mortgage: *McCabe v. Bellows*, 7



Gray, 148; 66 Am. Dec. 467, and note; St. Clair v. Morris, 9 Ohio, 15; 34 Am. Dec. 415, and note. See Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318. Foreclosure of a mortgage in which the wife did not join, and sale thereunder, do not bar her right of dower in the mortgaged premises, although she is made a party defendant in the foreclosure proceedings, but in which her right of dower is not put in issue: Moomey v. Maas, 22 Iowa, 380; 92 Am. Dec. 395, and note. See Verry v. Robinson, 25 Ind. 14; 87 Am. Dec. 346; Pledger v. Ellerbe, 6 Rich. 266; 60 Am. Dec. 123.

CASES  
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LEWIS v. STATE.

[36 TEXAS CRIMINAL REPORTS, 37.]

**SODOMY WITH A WOMAN.**—Copulation of a man with a woman by penetrating her anus is sodomy. The term "mankind," as used in statutes defining sodomy, includes woman.

M. Trice, assistant attorney general, for the state.

37 HENDERSON, J. Appellant was convicted of sodomy, and given fifteen years in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal. There is no bill of exceptions in the record. The alleged sodomy was with a woman. The details are revolting, and not necessary to be stated. The contention of the appellant that the act could not be performed with a woman is without any foundation to support it, the statute and authorities on the subject being otherwise. The statute reads: "If any person shall commit with mankind . . . the abominable and detestable crime against nature." Woman is included under the term "mankind": See Rev. Pen. Code, art. 364; 2 Bishop's Criminal Law. sec. 1193. The copulation in the mouth in this instance was not sufficient, but the proof was unquestioned that the appellant copulated with a woman by penetrating her fundament or anus with his penis.

The judgment is affirmed.

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**SODOMY.**—TO CONSTITUTE the crime of sodomy, the act must be in that part of the body where sodomy is usually committed: *Prindle v. State*, 31 Tex. Crim. Rep. 551; 37 Am. St. Rep. 833, and note. See *People v. Hodgkin*, 94 Mich. 27; 34 Am. St. Rep. 321, and note.

The crime is said to be "too well known to be misunderstood, and too disgusting to be defined further than by merely naming it": Monographic note to State v. Campbell, 94 Am. Dec. 254.

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## LOUIS v. STATE.

[36 TEXAS CRIMINAL REPORTS, 52.]

**CARRYING WEAPONS—BRASS KNUCKLES.**—Under an information charging a defendant with carrying "brass knuckles," evidence is admissible that the knuckles were made of any metal or hard substance.

**EVIDENCE—JUDICIAL KNOWLEDGE—BRASS KNUCKLES.**—A court takes judicial notice of the fact that the weapon known as "brass knuckles" may be made of any metal or hard substance as well as of brass.

M. Trice, assistant attorney general, for the state.

<sup>52</sup> HURT, P. J. Appellant was convicted of carrying brass knuckles. The information alleges that the appellant carried "brass knuckles." The proof left it in doubt as to whether the knuckles were made of brass or some other metal. The proof supporting the information shows, however, that it was made of a metal. This court judicially knows that "brass knuckles" may be composed of metal other <sup>53</sup> than brass, as steel, iron, etc; and, when the information charges "brass knuckles," it is equivalent to an allegation that they were made of metal or a hard substance. It is not an allegation charging that the knuckles were made of the metal known as "brass." This proposition is settled in Harris v. State, 22 Tex. Crim. App. 677. The court instructed the jury that "brass knuckles" meant knuckles made of any metal or hard substance. We so held in the case above cited. There is no variance or failure of proof in this case. It was not necessary to prove that the knuckles were made of the metal known as "brass," and there was no error in the charge of the court. The statute does not read that, if any person shall carry, on or about his person, "brass knuckles," or "knuckles made of metal or some other hard substance," thus drawing a distinction between brass knuckles and knuckles made of some other metal. If this had been the reading of the statute, the state would have been required to prove that the knuckles were composed of brass.

The judgment is affirmed.

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**CONCEALED WEAPONS.**—Riding or going about armed with unusual and dangerous weapons to the terror of the people is an offense at common law: State v. Huntly, 3 Ired. 418; 40 Am. Dec.



416, and note. In this country the offense has been generally defined by statutes which have been construed in various ways: *State v. Smith*, 11 La. Ann. 633; 66 Am. Dec. 208, and note; *Hutchinson v. State*, 62 Ala. 3; 34 Am. Rep. 1. As to the constitutionality of such statutes, see extended notes to *Fife v. State*, 25 Am. Rep. 561-563; and *Bliss v. Commonwealth*, 13 Am. Dec. 254, 255.

**EVIDENCE—JUDICIAL NOTICE.**—The general subject of judicial notice is discussed in the monographic note to *Lanfear v. Messtier*, 89 Am. Dec. 663-697. See, also, *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260; 57 Am. St. Rep. 28, and note; *People v. Truckee Lumber Co.*, 116 Cal. 397; 58 Am. St. Rep. 183.

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## CRAVEY v. STATE.

[36 TEXAS CRIMINAL REPORTS, 90.]

**MALICE AND MALICE AFORETHOUGHT — DIFFERENCE.**—The meaning of "malice" and "malice aforethought" is not precisely the same. Malice aforethought indicates a greater degree of wickedness than malice simply.

**MURDER—INDICTMENT.—MALICE AFORETHOUGHT** is essential to murder in both its degrees; and an indictment for murder alleging that the killing was done with "implied malice," but omitting to add the word "aforethought," is fatally defective.

**MURDER—INDICTMENT—MALICE AFORETHOUGHT.**—Under a statute defining murder as a killing with "malice aforethought," the indictment must charge the crime in the words of the statute or it is fatally defective.

R. H. Burney, for the appellant.

M. Trice, assistant attorney general, for the state.

**91 HURT, P. J.** Appellant was convicted of manslaughter, given five years in the penitentiary, and prosecutes this appeal. The only questions necessary to be considered in this case are those raised on the indictment. The indictment, in the charging part, is as follows, to-wit: "That James Cravey..... did then and there, with implied malice, kill Rafael Crane, by shooting him, the said Rafael Crane, with a pistol." The statute defines murder as follows: "Every person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either express or implied, shall be deemed guilty of murder": Pen. Code, art. 605. From this definition, it is absolutely necessary, to constitute murder, that the killing be with malice aforethought. This is so whether it be murder of the first or second degree. Malice aforethought is a necessary element to either degree. The first question presented is, whether "malice" means

precisely the same thing as "malice aforethought." If it does, then the indictment is sufficient. There is a well-settled rule of pleading in criminal cases—that the indictment must use the language of the statute, or language of similar or greater import than used by the statute. The language used by the statute is "malice aforethought." We have, in the indictment, "implied malice." There is nothing which stands for "aforethought." The "malice" in the indictment and that in the statute, of course, mean the same thing, but the <sup>92</sup> indictment contains no word for "aforethought." Hence, in order to sustain the indictment, we have to treat "aforethought" as a word without any meaning. Mr. Bishop, upon this subject, says that the meaning of these words is not precisely the same. The effect or meaning of the word "aforethought," in this phrase, indicates a greater degree of wickedness than "malice" simply. His language is as follows: "In opinions of courts, and other law writings, we frequently meet with language from which 'malice' alone would seem to signify the same thing as 'malice aforethought,' but apparently the better use assigned to the former (malice) a meaning somewhat less intense in wickedness than in the latter": 1 Bishop's New Criminal Law, art. 429. When we go to the precedents upon this subject, we find that in all cases of indictment for murder the phrase "malice aforethought" is used. Mr. Wharton, upon this subject, says, "It is necessary to state that the act by which the death was occasioned was done feloniously, and especially that it was done of malice aforethought, which, as we have already seen, is the great characteristic of the crime of murder": Wharton on Homicide, sec. 807. The same form is prescribed for indictment for murder by Archbold: See 1 Archbold's Pleading and Practice, 784, 785. We are not aware of any authority at common law holding that an indictment would be sufficient for murder which omitted to allege that the killing was done with malice aforethought. In some states it is held unnecessary. These opinions depend largely upon statutes. In this state the question is settled from another standpoint. We quote from Judge Willson: "'Malice aforethought' are technical words, for which, in an indictment for murder, there can be no equivalents or substitutes. They constitute an essential part of the definition of murder, both at common law and in our statute. Where the homicide is committed without 'malice aforethought,' either express or implied, it is not murder. At common law it has always been held essential to use these words in an indict-

ment for murder, and upon this point the common-law authorities and precedents are unanimous: 1 Bishop's Criminal Procedure, 335; 2 Bishop's Criminal Procedure, 544; 1 Archbold's Pleading and Practice, 784, 785; Wharton's Criminal Law, 8th ed., 518; 1 Wharton's Precedents of Indictments, 114 h; 2 Hale's Pleas of the Crown, 186, 187; Wharton on Homicide, sec. 807. Such, also, is the doctrine held by our own courts: *McCoy v. State*, 25 Tex. 33; 78 Am. Dec. 520; *Tooney v. State*, 5 Tex. Crim. App. 183." See *McElroy v. State*, 14 Tex. Crim. App. 236. "Malice," by writers, is frequently used as synonymous with "malice aforethought." This will be met with in charges to juries, and in text-books. We are not holding that it is necessary, in defining "malice aforethought," in the charge, for the court to say "malice aforethought." The indictment having charged malice aforethought, the charge of the court, defining "express malice," and, in a proper case, also "implied malice," is sufficiently responsive to the allegation in the indictment, "malice aforethought," and it is not necessary to reiterate this term in the charge of the court. We close this case with the following remarks of Judge Willson, in the case of *McElroy v. State*, 14 Tex. 93 Crim. App. 237, as follows: "It is indeed strange that the pleader should have omitted from the indictment these essential words. He certainly consulted no precedent, and did not even have reference to the statutory definition of murder; for, if he had taken this trouble, he could not have failed to discover the necessity of these words. In place of these he has encumbered the indictment with other words, which could and should have been omitted, because wholly useless in charging this offense. If those whose duty it is to prepare indictments would exercise a reasonable amount of care, and occasionally, at least, consult the law as to the requisites of an indictment, and frame their indictments with reference to the statutory definitions of offenses, it would save the country from much trouble and expense, and aid greatly in the speedy and effectual enforcement of the criminal law. We do not make these remarks with reference to this case alone, for it is by no means an isolated or unusual case, in this particular. This court is compelled almost daily to set aside convictions because of the carelessness of prosecuting officers in the preparation of indictments. Such palpable and fatal mistakes as the one before us are of such frequent occurrence that we have deemed it proper to call attention to the evil, with the hope that district and county attorneys will reflect



upon the consequences which result from defective indictments, and bestow more thought and attention upon the preparation of them."

The judgment is reversed and the prosecution ordered dismissed.

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**HOMICIDE—INDICTMENT—SUFFICIENCY OF—MALICE AFORETHOUGHT.**—An indictment stating an offense in the language of the statute creating it should be deemed sufficiently technical: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447, and note; monographic note to *State v. Campbell*, 94 Am. Dec. 253-258. An indictment for murder, under the Iowa statute, must charge that the killing was done with malice aforethought, but it is not essential that these identical words be used: Monographic note to *Schaffer v. State*, 3 Am. St. Rep. 282.

**HOMICIDE—MALICE AND MALICE AFORETHOUGHT.**—Malice is one of the necessary ingredients of the crime of murder; and malice may be defined as the absence of legal justification, excuse, or extenuation in the commission of an unlawful act. And though a killing to be murder must have been done with "malice aforethought," still such malice need not have existed any considerable length of time prior to the killing; for if it exists for any time, however short, before the act, it is malice aforethought in law: Note to *State v. Alexander*, 14 Am. St. Rep. 882; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, and note.

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## THORNLEY v. STATE.

[36 TEXAS CRIMINAL REPORTS, 118.]

**FORGERY—INDICTMENT—SECONDARY EVIDENCE.**—If an indictment for uttering a forged instrument sets out only its substance, and alleges that it is lost or destroyed, or that it is in the possession of the accused and not within the reach of the process of the court, this is sufficient notice to the accused to produce the instrument, and his failure to do so is sufficient to admit secondary evidence of its contents.

**FORGERY—EVIDENCE—CHARGE LIMITING EFFECT OF.**—If, on a trial for uttering a forged instrument, evidence is admitted to show that the accused had another alleged forged instrument in his possession, the duty then devolves upon the court to limit and restrict by instructions the purposes for which alone the jury may consider such evidence, and the failure of the court to so instruct is fatal error, although the charge is not excepted to for such omission.

**EVIDENCE—EXTRANEOUS CRIMES—INSTRUCTIONS.**—If proof of an extraneous crime is admitted in a criminal case, and the effect of such evidence has a tendency or might bring about a conviction for the extraneous crime, or to injure the rights of the accused in the case on trial then, and then only, must the court restrict the effect of such evidence in the charge to the jury.

Bowen & Creager and Hazelwood & Smith, for the appellant.  
M. Trice, assistant attorney general, for the state.

<sup>122</sup> HURT, P. J. Conviction for passing a forged instrument. Punishment assessed at two years' confinement in the penitentiary. It appears, from the record, that the appellant was tried for forging the instrument in question on the twenty-fourth day of June, 1895, in the forty-eighth judicial district court (Tarrant county). At that time the instrument alleged to have been forged was in the possession of the father of the appellant, and was used upon the trial of the forgery case. After that trial, the father left Texas, and went to South Carolina, carrying with him the forged instrument. The indictment in this case was presented into the district court of the seventeenth judicial district (Tarrant county), on June 26, 1895. From the testimony it appears that the instrument was then in the possession of the father of the appellant. The indictment in this case alleges that said instrument was "in the possession or power of the said Perry F. Thornley, or is lost or destroyed, and is not within the reach of the process of the court, and not accessible to the grand jury." Said indictment gives notice to the appellant to produce the said original instrument upon the trial of <sup>123</sup> the case, or secondary evidence will be used to prove its contents. The indictment does not attempt to set out the instrument by its tenor, but its substance. Counsel for the appellant insists that the notice to produce the instrument was not sufficient. We suppose that the contention is that the party in possession of the instrument should have been summoned to subpoena duces tecum. This was impossible, for the instrument was in the possession of the father of the appellant, who was beyond the process of the court. The indictment alleges the fact that the said instrument was not within the reach of the process of the court, and the testimony for the appellant establishes the truth of this fact beyond any sort of question. This being the case, all that could have been done was done. It is impossible for the state to send to another state its process, and bring to this state the father of the appellant, or the instrument. Upon this subject Mr. Bishop says "that, before evidence of the forgery will be admitted at the trial, the forged instrument must be produced, or its nonproduction justified from necessity, as by showing that it is lost or destroyed, or not within the reach of the process of the court. The general rule requiring the instrument is met by the fact that the instrument was not within the reach of the process of the court": See 2 Bishop's Criminal Procedure, sec. 433. As before stated, the indictment does not attempt to set

out the instrument by its tenor, but its substance. That being the case, it is altogether immaterial whether the word "or" appears before the words "M. M. Co." In this case, however, a copy of the instrument was made. This copy was introduced in evidence, and is correctly sworn to by two persons—one who made it, and the other who compared it. If the instrument had been set out by its tenor, this proof would amply sustain the indictment. It is contended, however, that there is no evidence in this record tending to establish the fact that the instrument was a forgery. We are of the opinion that there is ample proof of that fact, and that appellant knew it to be such when he uttered it. It is also contended, as there was evidence introduced tending to show that the appellant was in possession of another forged instrument, that, therefore, it was reversible error (whether excepted to or not) for the court to omit, in its charge, to limit that evidence to its proper office. This omission in the charge was not excepted to at the time, nor mentioned in the motion for a new trial. It is urged for the first time in this court. Notwithstanding this, if the omission was calculated to injure the rights of the accused, under all of the circumstances of the case, we would reverse the judgment. Now, if the court had charged the jury, as contended by the appellant, the charge would have told the jury that they could look to the evidence tending to show the other forgery for the purpose of determining the intent upon which the appellant acted in this case. There was no danger that the jury would convict the defendant on this trial of the other forgery. By such a charge their attention, let it be shaped as it may, would have been specially called to a very strong criminative fact in this case. We are of opinion that this omission, under the circumstances of this case, <sup>124</sup> was not at all calculated to injure the accused. Counsel for appellant insist that there was error in permitting J. E. Harper to testify that he had not signed the note, etc., thus proving its forgery. The objection was that the indictment had not alleged that J. E. Harper had signed the note. This is a prosecution for passing a forged instrument, and, under such a prosecution, these allegations are not necessary: See Willson's Criminal Forms, No. 311, for passing and attempting to pass as true a forged instrument: 2 Bishop's Criminal Procedure, sec. 447. We find no error in the judgment which requires a reversal thereof, and it is therefore affirmed.

Davidson, J., absent.



## ON MOTION FOR REHEARING.

HURT, P. J. This case comes before us on motion for rehearing on the part of the appellant, the case having been affirmed at the Dallas term. Appellant insists that this case should be reconsidered, and a rehearing granted, because this court was in error in not holding that it was fundamental error because the court failed to instruct the jury as to the purpose for which they should consider the testimony introduced before them in regard to the passing by appellant of another forged instrument, and in this connection cites us to a number of authorities bearing upon this point. The other alleged forged instrument, which was introduced in evidence, was similar in form, and for the same amount, and the evidence tended to show was forged by appellant. We have examined the authorities referred to, and they indicate, with but few exceptions, an unbroken line of decisions to the effect that, when evidence is adduced, on the trial of a case against a defendant, tending to show the commission of another crime by him, it is the duty of the court, whether asked or not, to properly instruct the jury with reference to the purposes and object of such testimony. The exceptions to this rule, when examined, will be found to recognize the general rule, and to be predicated upon some peculiarity in the particular case: See *Reno v. State*, 25 Tex. Crim. App. 110; *Barnes v. State*, 28 Tex. Crim. App. 30; *Carter v. State*, 23 Tex. Crim. App. 508; *Mayfield v. State*, 23 Tex. Crim. App. 645; *Alexander v. State*, 21 Tex. Crim. App. 407; 57 Am. Rep. 617; *Holmes v. State*, 20 Tex. Crim. App. 509; *Kelley v. State*, 18 Tex. Crim. App. 262; *House v. State*, 16 Tex. Crim. App. 32; *Barton v. State*, 28 Tex. Crim. App. 484; *Washington v. State*, 23 Tex. Crim. App. 338; *Maines v. State*, 23 Tex. Crim. App. 576; *Davidson v. State*, 22 Tex. Crim. App. 382; *Higgenbotham v. State*, 24 Tex. Crim. App. 505. This very question came before this court in *Burks v. State*, 24 Tex. Crim. App. 326, and in that case the court used the following language: "Upon the trial the state proved, not only the attempt to pass the forged instrument to the party alleged in the indictment, but also that the defendant attempted to pass the said instrument on the <sup>125</sup> same day, but at a different time and place, to another person. This evidence was admissible to prove the defendant's fraudulent intent with respect to the attempt for which he was on trial. But the court, in its charge to the jury, failed to restrict said evidence to the purpose

for which it was admitted, by proper instructions to the jury, which omission is reversible error, although not excepted to." And also see *Hennessy v. State*, 23 Tex. Crim. App. 340. Upon the former hearing of this case we were of the opinion that it came within the line of decisions which hold it unnecessary to charge upon and limit the effect of extraneous crimes when admitted as testimony; and, not coming within that category, and being of a criminative nature, the court should not have charged with reference to the matter, as it would have had a tendency to call the attention of the jury to this circumstance, so as to affect the appellant adversely. Upon a closer examination of the record and the authorities, we believe that we were wrong, and that the case comes strictly under the authority of *Hennessy v. State*, 23 Tex. Crim. App. 340, and *Burks v. State*, 24 Tex. Crim. App. 326, and that line of authorities. As we understand the law with reference to the admission of extraneous crimes, whenever they are admitted in evidence, and the effect has a tendency or might bring about a conviction for the extraneous crime, the court must limit the effect of the testimony in his charge to the jury. And this is the case, also, where the testimony, being admitted, has a tendency to injure the rights of the appellant in any other direction. The testimony must be limited. But where the testimony is simply used to prove up the case as *res gestae*, or to prove any other fact that forms a part and parcel of the case, so as to show the defendant's guilt, and there is no probability of the jury convicting for the offense not charged, it is not necessary to limit the effect of the testimony. In fact, it is only necessary for the court to charge upon and limit said testimony when there is danger of a conviction for the offense not charged, or of an unwarranted use of the testimony to the prejudice of the defendant in the case in which he is being tried. For the reasons stated, a rehearing is granted, the judgment is reversed, and the cause remanded.

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**FORGERY—INDICTMENT—SETTING FORTH FORGED INSTRUMENT—SECONDARY EVIDENCE.**—Indictment for forgery must set forth the instrument forged with literal accuracy, or show good cause for the omission to do so: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note; *State v. Potts*, 9 N. J. L. 26; 17 Am. Dec. 449, and note. If the excuse for such omission is that the instrument is in the hands of the accused, this fact should be averred: *State v. Parker*, 1 D. Chip. 298; 6 Am. Dec. 735. If it appears that the instrument is lost, destroyed, or, in the possession of the accused, secondary evidence of its contents may be given: *People v. Kingsley*, 2 Cow. 522; 14 Am. Dec. 520.

EVIDENCE OF ANOTHER CRIME THAN THAT CHARGED in support of that charged cannot, as a general rule, be admitted: *Farris v. People*, 129 Ill. 521; 16 Am. St. Rep. 283, and note. Thus, upon the trial of an indictment for forgery, evidence of admissions on the part of the prisoner of the commission of other forgeries is inadmissible, and cannot be considered by the jury in determining the question of criminal intent: *People v. Corbin*, 56 N. Y. 363; 15 Am. Rep. 427. If such evidence is admitted, it must be submitted to the jury with instructions properly limiting its consideration: Monographic note to *Strong v. State*, 44 Am. Rep. 299-308; *Porath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954.

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### CAFFEY v. STATE.

[36 TEXAS CRIMINAL REPORTS, 193.]

**FORGERY—INCOMPLETE INSTRUMENT.**—If the statute provides that a check in payment of the wages of a school teacher "shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as teacher," an indictment for the forgery of such a check, which fails to set out the affidavit of the teacher, and to allege that such affidavit accompanied the check is fatally defective.

**FORGERY—STATUTORY INSTRUMENTS.**—If the statute authorizes an instrument not known to the common law, and so prescribes its form as to make any other form void, forgery cannot be committed by making an instrument in a form not provided by the statute, although it is so like the genuine as to be likely to deceive most persons.

**FORGERY—WHAT SUBJECT OF.**—An instrument, to be the subject of forgery, must, on the face of it, be good and valid for the purpose for which it is created. If void or invalid on its face, it cannot be good by averment, and forgery cannot be predicated upon it.

**FORGERY—INCOMPLETE INSTRUMENT.**—If the statute requires that a check in payment of a teacher's wages shall be accompanied by his affidavit, showing that he is entitled to the amount of the check for compensation as teacher, such check without such affidavit is an incomplete instrument, not in the form provided by the statute, invalid on its face, and forgery cannot be predicated upon it.

Lindsey & Gordon, for the appellant.

M. Trice, assistant attorney general, for the state.

<sup>199</sup> HURT, P. J. Appellant was convicted of forging the following instrument of writing, commonly called "a school voucher," to wit:



"Approved. Chas. E.  
Williamson, County (Ex  
officio) Superintendent,  
Comanche County."

"No. 5.

\$36.00

"Blanket Creek School District No. 51, Comanche County, Texas, May 20th, 1890. Pay to Linda C. Switzer, or order, the sum of thirty-six dollars out of the public school fund apportioned to the Blanket Creek School District No. 51, for services as teacher in the public free school of said district for the month ending the——day of May 20, 1890.

"J. B. GATES,

"B. W. SWITZER,

"Trustees of School District No. 51, in Comanche County, Texas.

"To A. J. Caffey, County Treasurer, Comanche County, Texas."

**200** Appellant moved to quash the indictment, because, under the law of this state, the instrument set forth in the indictment was not the subject of forgery, nor could it be made the subject of forgery by any allegations. Our statute on the subject of payment of amounts due school teachers reads as follows: "The amount contracted by trustees to be paid a teacher shall be paid on a check drawn by the majority of the trustees on the county treasurer, and approved by the county superintendent. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as a teacher": See Acts 1884; Sayles' Civ. Stats., art. 3776; Rev. Stats. 1895, art. 3962. The indictment shows that two of the school trustees signed the check. It also shows that it was approved by the county superintendent of said county. It fails to allege that the affidavit of the teacher accompanied the check. The contention of the appellant is that this check is absolutely void, as it neither created, increased, diminished, discharged, nor defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever. The question for our decision is this: In the absence of the affidavit of the teacher, which must accompany the check, is it such an instrument as is the subject of forgery? If the treasurer had paid the check, in the absence of the affidavit, he would have done so without authority, and against the law, and the check would have been no voucher to him in his settlement of accounts with the commissioners' court. This is not the case of the irregular or bungling execution of an instrument which is the subject of forgery, but it is a case of

forging an instrument which, standing alone, is not such a completed instrument as to be the subject of forgery. Now, we are not to be understood as holding that this check is not the subject of forgery; but, to constitute it the subject of forgery, there must be the affidavit of the teacher accompanying it, for, in order to give it any force or effect, it requires both the check, properly signed and approved, and the affidavit of the teacher. Without the affidavit of the teacher, standing alone, it is not the subject of forgery. Why? Because the statute says, "the check shall in all instances be accompanied by the affidavit of the teacher." The instrument by which a teacher, under the laws of the state of Texas, is authorized to demand and receive pay for his services, is a creature of the law. The terms of such an instrument are defined by the law, and, before he himself has such an obligation as he can make a legal demand for his services, he must have the instrument provided by the law. He cannot go with the check simply signed by a majority of the trustees, or by all of the trustees, and demand his salary. To have the completed instrument, and in order to make a legal demand, he must also have the approval of the superintendent and the affidavit provided by law. Then he has a complete instrument, and has a legal demand for his services. We cite the following cases as being in point, and having a direct bearing upon this subject: *Roode v. State*, 5 Neb. 174; 25 Am. Rep. 475; *Cunningham* <sup>201</sup> v. *People*, 4 Hun, 455; *People v. Harrison*, 8 Barb. 560; *State v. Smith*, 8 Yerg. 150; *People v. Heed*, 1 Idaho, 531. We are not aware that the exact question here presented has ever been decided by our courts, but analogous questions have been decided in the courts of other states. In the case of *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475, it was held that a married woman's deed, without an acknowledgment, which, under the laws of the state where it was executed, made it void, was such an instrument as was not the subject of forgery. This case refers to Mr. Bishop, and quotes from him as follows: "An instrument, to be the subject of forgery, must, on the face of it, be good and valid for the purpose for which it was created": 2 Bishop's Criminal Law, 506. In the case of *Cunningham v. People*, 4 Hun, 455, the prisoner caused to be engraved and printed what purported to be warrants drawn by the auditor of public accounts on the state treasurer of Mississippi, and had a seal made. He filled in the blanks of two warrants, but made no impression with the seal upon them. The warrants, by the law of Mississippi, were

invalid without a seal, and it was held that the instruments, being invalid on their face, were not the subject of forgery, and it was further held that, if the statute authorizes an instrument not known to the common law, and so prescribes this form as to render any other form void, forgery cannot be committed by making an instrument in a form not provided by the statute, even though it is so like the genuine as to be likely to deceive most persons. In *People v. Harrison*, 8 Barb. 560, it was held that an indictment would not lie for forgery of a certificate of acknowledgment of a deed, which certificate did not state that the grantor acknowledged the execution of the conveyance. It was stated that, in order to be the subject of forgery, a written instrument must be valid, and, if genuine, for the purpose intended. If void or invalid on its face, it cannot be made good by averment. The crime of forgery cannot be predicated upon it. In *State v. Smith*, 8 Yerg. 150, it is said that an instrument void in law upon its face is not the subject of forgery, because the genuine and the counterfeit would be equally useless, imposing no duty or conferring no right; as the forgery of a will for lands, having only two witnesses, when three were required, where the court held the instrument void on its face and no forgery—referring to *Wall's case*, 2 East P. C. 953. These authorities support the view we take of the question involved in this case, and the judgment of the lower court is accordingly reversed and the cause dismissed.

Henderson, J., concurs.

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Mr. Justice Davidson dissented on the ground that the check in question was upon its face a valid instrument without the affidavit required by the statute, and, as such, was the subject of forgery. He said: "Appellant's contention, which is sustained by a majority of the court, that the check declared upon is illegal and void upon its face, because the indictment does not allege that the affidavit of the teacher accompanied said check, is, in my opinion, not sound, as I understand the law with reference to the question of forgery. The basis of the opinion of the majority is that the affidavit must not only accompany the check given by the trustees, but it must accompany it when presented to the county treasurer for payment. I cannot concur in this view of the law. . . . This check, signed by a majority of the trustees, and approved by the county superintendent, is a complete and valid instrument 'upon the face of it.' But even if these matters have not been complied with, yet the check is a completed instrument 'upon the face of it,' whether approved by the county judge or accompanied by the affidavit or not. It is a completed instrument, so far as the trustees can make it, whether the affidavit is made or not, and the absence of said affidavit could not possibly affect the terms of the check as shown 'upon the face of it.' Mr. Bishop says that 'an instrument, to be the subject of



forgery, must on the face of it be good and valid for the purpose for which it was created': 2 Bishop's Criminal Law, 506. Such is the well-settled law in Texas, under all of the decisions where the question has ever been discussed: See *Hendricks v. State*, 26 Tex. Crim. App. 176; 8 Am. St. Rep. 463; *King v. State*, 27 Tex. Crim. App. 567; 11 Am. St. Rep. 203.

"I do not question the authorities relied upon by the majority of the court as enunciating correct principles of law; and, if this instrument came within the contemplation of the rule laid down by said authorities, I would readily concur in the opinion of the majority. I think, however, a careful examination of each case cited will demonstrate the fact that in each instance the court rendering the opinion was discussing only that character of instrument which was of no legal effect or efficacy 'upon the face of instrument itself': and if this instrument was of that character, then the indictment would be vicious. But this check was, 'on the face of it,' good and valid for the purpose for which it was created. It was given for a specified sum of money, payable to the proper school teacher, signed by the requisite number of school trustees, and approved by the county judge, as ex-officio superintendent. A simple glance at the face of the instrument declared upon verifies this statement. There was no other act of the trustees to be performed, and no act of the teacher or the superintendent of the treasurer could add to or detract from the terms on the face of that instrument; and, if the teacher or the superintendent had changed the terms of the instrument after its execution by the trustees, they might themselves have been guilty of altering the check. The act of the teacher in making the affidavit could not affect the terms of the check as given by the trustees, in so far as the face of the instrument itself is concerned. His act was an independent one, forming no part of the terms of the check, and could not increase or diminish its efficacy as the act of the trustees. It was the independent act of the payee of the check. It was an extraneous matter, and was not a prerequisite to the execution or making of the check. The statute does not require that this affidavit shall be made before the execution of the check, but only requires that it shall accompany the check; and, under the various provisions of the law, its object is to show that the teacher is entitled to the amount specified in the check as compensation for his services as teacher. This compensation is based upon the number of the pupils taught by him, and is covered in the monthly report. So far as the act of the teacher was concerned, the check was as complete 'on the face of it,' and for the purpose for which it was created, without the affidavit as it was with it; and, this being so, it was capable of being used to consummate a fraud, and therefore was and is the subject of forgery under our statute: *Kennedy v. State*, 33 Tex. Crim. Rep. 183; *Hendricks v. State*, 26 Tex. Crim. App. 176; 8 Am. St. Rep. 463; *King v. State*, 27 Tex. Crim. App. 567; 11 Am. St. Rep. 203; *Lassiter v. State*, 35 Tex. Crim. Rep. 540; *People v. Bibby*, 91 Cal. 470; *Commonwealth v. Costello*, 120 Mass. 367; *Rudicel v. State*, 111 Ind. 595. The check, then, being complete upon its face, and the affidavit a separate and independent document, not necessary to the execution of the check, it is an extrinsic independent fact and, even if not made, could not affect the completeness of the check, in so far as the 'face of it' is concerned. This check was of at least apparent legal efficacy. It was drawn by the proper trustees, in favor of the proper teacher for a definite sum. And this was all, under the law, that the trustees could do, or were required to do. And their act gave the check legal efficacy, and served as the foundation of a legal claim and demand, and it could be used as legal proof. There was no defect in regard to the terms of the check, as shown by the 'face of it.' There was nothing that

rendered it doubtful upon the 'face of it,' so as to require innuendo averments in declaring upon it. It was then a completed instrument for the purpose for which it was created, and, tested by Mr. Bishop's rule, 'it is good and valid, on the face of it, for the purpose for which it was created.' Now, what was that purpose? Simply to order the payment to the teacher of the amount of money specified on the face of it, out of a certain school fund, belonging to Blanket School District No. 51, for services as teacher of said district for the month ending May 20, 1890. It certainly was good for this purpose, and, if the teacher failed to make the required affidavit, that failure could not affect the terms of the instrument. If the check was void without the affidavit, as held by the majority, then there was no act save the oath of the teacher that could render it valid; and, in case of his death before making said affidavit, it could not form the basis of a claim by his estate that could be enforced against the school fund. If void during the life of the teacher, the fact of his death would not operate to make the check valid, or give it any legal standing. I do not apprehend that this position would be contended for as being correct, for, in case of the death of the teacher before the affidavit is made, the check certainly would constitute the basis of a claim in favor of his estate for the services rendered by him as such teacher. If this be true, the instrument was not a void one, and, if it had been genuine, it certainly could be made the basis of a legitimate and valid claim for the sum specified upon its face. But it is not necessary that the instrument be actionable in order to constitute it the subject of forgery. It is sufficient if the instrument affects property and is one which could be used as evidence, either for or against a person whose act it purports to be, or against any other person: See *State v. Boasso*, 38 La. Ann. 202; *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158; *State v. Dunn*, 23 Or. 562; 37 Am. St. Rep. 704; *People v. Munroe*, 100 Cal. 664; 38 Am. St. Rep. 323; 24 Law. Rep. Ann. 33 et seq., and notes, for collated authorities on questions discussed. I therefore feel constrained to dissent from the opinion of my brethren—from the position upon which they have predicated their opinion that the instrument is void without the teacher's accompanying affidavit. I think the judgment in this case should be affirmed."

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**FORGERY—WHAT INSTRUMENTS SUBJECT TO.**—When a writing is invalid on its face, it cannot be the subject of forgery because it has no tendency to effect a fraud: *State v. Evans*, 15 Mont. 539; 48 Am. St. Rep. 701, and note; *State v. Dunn*, 23 Or. 562; 37 Am. St. Rep. 704, and note. See extended note to *Hendricks v. State*, 8 Am. St. Rep. 466-470. If a statute prescribes the form of an instrument unknown to the common law, so as to render any other form null, forgery cannot be committed by making an instrument of that character which is not in the prescribed form: *Monographic note to Arnold v. Cost*, 22 Am. Dec. 316.

## McCULLAR v. STATE.

[36 TEXAS CRIMINAL REPORTS, 213.]

**APPELLATE PRACTICE.—A BILL OF EXCEPTIONS** to the exclusion of evidence, not approved by the trial judge, cannot be considered on appeal.

**SEDUCTION—EVIDENCE OF CHARACTER—IMPROPER REMARKS ON WEIGHT OF EVIDENCE.**—If, on a trial for seduction, a witness has testified that the reputation of the prosecutrix for chastity is good, and, on cross-examination, has testified that he has never heard anyone speak of her reputation in that respect, and the court, in overruling a motion to exclude such testimony, remarks that "there is no higher evidence of the good character of a person than that it was never discussed; that fact is the very best evidence of good character," such remarks are clearly upon the weight of evidence and erroneous, and justify a reversal of the judgment.

**SEDUCTION—PROSECUTRIX AS ACCOMPLICE—CORROBORATION.**—In seduction, the prosecutrix is an accomplice, and the court should instruct the jury that in order to convict they must believe that the defendant promised to marry the prosecutrix, and that, by reason of such promise, she was induced to yield her virtue to him, and that there must be testimony outside of that given by her, tending to show that he induced her to have carnal intercourse with him by reason of his promise to marry her.

**SEDUCTION—PROMISE TO MARRY ESSENTIAL TO.**—The gist of the offense of seduction is the promise of defendant to marry the prosecutrix and the yielding by her of her virtue in consequence of such promise.

B. F. Ballard, T. P. Morris, and A. J. Williams, for the appellant.

M. Trice, assistant attorney general, for the state.

**214 DAVIDSON, J.** Appellant was convicted of seduction, and given two years in the penitentiary, and prosecutes this appeal. There is nothing in appellant's motion to quash the indictment in this case. It follows the statutes, and is in accordance with Willson's form on the subject. On the trial of this case, the defendant introduced Eliza McCullar to prove that Anna May Lindsey was not a woman of virtuous character. Said witness testified on her direct examination that she knew the general reputation of Anna May Lindsey in the community in which she lived, as a woman of virtue and chastity, and that such reputation was bad; and afterward, on her cross-examination, by the state, she testified that she had heard different ladies in the neighborhood speak disparagingly of her conduct as early as April, 1893. She also stated that she had "heard it said, a half dozen or more times, that Anna May Lindsey would not do, and that her language was rough, and her manner rude, and did improper things with men." On further examination, this witness



stated that she never heard any person say she was not a virtuous woman. The state then objected to said testimony, and asked to have it excluded from the jury. The court excluded the same, and the defendant reserved his bill of exceptions thereto. This bill of exceptions appears in the record, but it is not approved by the trial judge. The evidence appears to have been admissible, but, as the bill is not approved, we cannot consider it. The state introduced one Chase, as a witness, who testified that the reputation of Anna May Lindsey for virtue and chastity was good in the community in which she lived. On cross-examination, the said witness stated that he had never heard anyone speak of the reputation of said Anna May Lindsey in that respect. Thereupon the defendant objected to said testimony, and asked that the <sup>215</sup> same be excluded. The court thereupon overruled the objection of appellant, and in that connection remarked: "The authorities agree, and the courts have held, that there is no higher evidence of the good character of a person than that it was never discussed. That fact is the very best evidence of good character." Appellant objected to the remark made by the court in connection with the exclusion of said evidence, and saved his bill of exceptions thereto. It may be true, as stated by the court, that a witness may be qualified to speak of the general reputation of a person as to some quality without having heard the person's character in that respect discussed. But, in this case, the character of the prosecutrix for chastity was a direct issue in the case, and for the court to remark, in the presence of the jury, in passing on the admissibility of such testimony, that the fact that the witness had never heard the reputation of the prosecutrix in that regard discussed was the very best evidence of her good character in that respect, was a remark upon the weight of the testimony made in the presence of the jury, and was calculated to impress them with the idea that the testimony of the witness as to the character of the prosecutrix in the respect inquired about was of the very highest. No doubt the learned judge simply meant to state that the predicate laid by such testimony was sufficient to enable the witness to speak as to the character of the prosecutrix. If he had said this, no evil result could have ensued; but, instead thereof, his expression was calculated to impress the jury that the evidence as to the character of the prosecutrix came from the very highest source. This, we think, was error: See *Wilson v. State*, 17 Tex. Crim. App. 525; *Cook v. State*, 27 Tex. Crim. App. 198; *Reason v. State* (Tex. Crim. App., April 6, 1895), 30 S. W. Rep. 780; *Lawson v. State* (Tex. Crim.

App., Nov. 13, 1895), 32 S. W. Rep. 895; *Kirk v. State*, 35 Tex. Crim. Rep. 224. As is usual in this character of offenses, the state relied mainly on the testimony of the prosecutrix for conviction. Under our statutes she is regarded as an accomplice, and it is imperative that the state introduce other testimony, outside of her evidence, tending to connect the defendant with the commission of the offense. The court gave a charge on this subject, but, in view of the evidence in this case, we would suggest that, on another trial thereof, the court instruct the jury clearly and explicitly that there must be testimony, outside of that of the alleged accomplice, tending to show that the defendant induced the prosecutrix to have carnal intercourse with him by reason of his promise to marry her; that is, they must believe that the defendant did promise to marry the prosecutrix, and that, by reason of such promise, she was induced to yield her virtue to him. As was said in *Putnam v. State*, 29 Tex. Crim. App. 454; 25 Am. St. Rep. 738, quoting from *Boyce v. People*, 55 N. Y. 644: "The offense consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse by promise made at the time. The promise and yielding of her virtue in consequence thereof is the gist of the offense. If she resists, but finally assents or yields thereto in reliance upon the promise made, the offense is committed." Appellant in this case asked <sup>216</sup> several special charges, which might with propriety have been given; but no exceptions were reserved to the refusal of the court to give said charges, and we do not consider them. We think the court correctly refused to give the special charge asked by the appellant on his minority. For the error of the court in his remark in passing upon the admissibility of testimony above discussed, the judgment is reversed, and the cause remanded.

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IN THE CASE of *Copeland v. State*, 36 Tex. Crim. Rep. 575, it appeared, on a trial for keeping and exhibiting a gaming table and bank, two witnesses testified that they had been employed by the sheriff as detectives to ferret out gaming cases, and the accused requested the court to charge the jury that, "in passing upon the guilt or innocence of the defendant, you may take into consideration the fact that the witnesses were paid and hired to catch the defendant, if they were so paid and hired." and it was held that there was no error in refusing to give such instruction, as it was objectionable as singling out two witnesses, as being upon the weight of evidence, and as calling the attention of the jury especially to these facts as weighing upon their credibility.

APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY OF.—It is the exclusive province of the trial judge to determine the correctness

of a bill of exceptions which he is requested to sign, and he should sign such a one as he believes to be correct, and none other: *People v. Jameson*, 40 Ill. 93; 89 Am. Dec. 337, and note. See *Steele v. Bates*, 2 Aik. 338; 16 Am. Dec. 720.

**SEDUCTION—TESTIMONY OF PROSECUTRIX.**—The crime of seduction cannot be established by the uncorroborated testimony of the prosecutrix, and she must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse, but the corroborating evidence need not support all the necessary elements of the crime: *Ferguson v. State*, 71 Miss. 805; 42 Am. St. Rep. 492, and note; *Wright v. State*, 31 Tex. Crim. Rep. 354; 37 Am. St. Rep. 822. See note to *State v. Reeves*, 10 Am. St. Rep. 356.

**SEDUCTION—CRIME OF—WHEN CONSTITUTED.**—As generally understood, seduction is the use of some influence, art, promise, or deception by a man by which he induces a woman to surrender her virtue: Monographic note to *State v. Carron*, 87 Am. Dec. 405. Statutes generally require seduction to be accomplished under a promise of marriage: Monographic note to *State v. Carron*, 87 Am. Dec. 408; extended note to *People v. De Fore*, 8 Am. St. Rep. 870-872. It is not necessary that the promise should be a valid and binding one between the parties: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177, and note.

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## CLINE v. STATE.

[36 TEXAS CRIMINAL REPORTS, 320.]

**EVIDENCE IN CRIMINAL CASES—REPRODUCTION OF TESTIMONY OF DEAD WITNESS.**—The testimony of a witness who has since died, taken and reduced to writing at the preliminary examination in a criminal case, cannot be used as evidence against the accused upon the main trial. Such testimony is not a "deposition" allowed by statute to be read in evidence in criminal cases, for the reason that the requisites of, and formalities prescribed for, the taking of such depositions are not the same as those required in taking the testimony in preliminary examinations.

**CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional guaranty "that in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury, and shall be confronted with the witnesses against him," requires that on the trial of a criminal prosecution before a jury the accused shall be confronted with the witnesses against him, and testimony taken at the preliminary examination, although in the presence of the accused and when he has the right to cross-examine the witnesses, cannot be used as original evidence against him on the final or any subsequent trial of the case.

**CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional and statutory guaranty to the accused of the right upon his trial to be confronted with the witnesses against him, except in certain cases provided for when depositions have been taken, excludes all testimony except that of the confronting witnesses, and such depositions as have been taken in conformity with the law.

**CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional guaranty of the right of an accused to be confronted with the witnesses against him on his trial is not a rule of evidence, and cannot be avoided on the ground of necessity. The fact that the accused has been confronted with



such witnesses on his preliminary examination does not satisfy the constitutional guaranty; he must be confronted with them on his trial before a jury.

Burgess & Hopkins, for the appellant.

M. Trice, assistant attorney general, for the state.

**336** DAVIDSON, J. This conviction was had for murder in the second degree. The state, over appellant's objection, introduced before the jury the written evidence of one Monroe, taken on the examining trial of appellant under a charge for the same offense of which he was in this case convicted. As a predicate for the introduction of this testimony, the death of the witness was proved. The objection urged was that the accused "shall be confronted with the witnesses against him," as guaranteed by section 10 of the bill of rights of the state constitution. The testimony was admitted, presumably under the provisions of article 774 of the Code of Criminal Procedure (1879), which reads as follows, to wit: "The deposition of a witness taken before an examining court, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the two preceding articles for the reading in evidence of depositions." In regard to examining trials, article 267 of the Code of Criminal Procedure provides that "the testimony of each witness examined shall be reduced to writing by the magistrate or some one under his direction, and shall be read over to the witness, or he may read it over himself, and such corrections shall be made in the same as the witness shall direct, and he shall then sign the same by affixing his name or mark. All the testimony **337** thus taken shall be certified to by the magistrate taking the same." All judges of the supreme court, court of criminal appeals, district courts, county courts, or justices of the peace, are magistrates, and when holding such examining trials are called "examining courts": Code Crim. Proc., arts. 42-63. With reference to depositions, the Code of Criminal Procedure, article 757, enacts that, "when an examination takes place in a criminal action before a magistrate, the defendant may have the depositions of any witness taken by any officer or officers hereafter named in this chapter; but the state, or person prosecuting, shall have the right to cross-examine the witnesses, and the defendant shall not use the depositions for any purpose unless he first consent that

the entire evidence or statement of the witness may be used against him by the state on the trial of this case." "Depositions of the witnesses may also, at the request of the defendant, be taken in the following cases: 1. When the witness resides out of the state; 2. When the witness is aged or infirm": Code Crim. Proc., art. 758. "Depositions of witnesses within the state may be taken by a supreme or district judge, or before any two or more of the following officers: The county judge of a county, notary public, clerk of the district court, and clerk of the county court": Code Crim. Proc., art. 759. "The deposition of a witness taken before an examining court may be taken without interrogatories; but whenever a deposition is so taken, it shall be done by the proper officer or officers, and there shall be allowed both to the state and to the defendant full liberty of cross-examination": Code Crim. Proc., art. 768. Such depositions may be taken without interrogatories, and the manner and form of taking and returning same shall conform to and be governed by the rules prescribed for taking depositions in civil causes: Code Crim. Proc., arts. 762, 763, 768, 769. "And when taken in such examining court, the deposition shall be sealed up and delivered by the officer or officers, or one of them, to the clerk of the county having jurisdiction to try the offense": Code Crim. Proc., art. 771. In order, then, to constitute this character of evidence a "deposition," the provisions of the statutes authorizing same must be complied with, for it is only by virtue thereof that such "depositions" can be taken. It will be seen that there are essential differences between taking "evidence" or "testimony" and returning same in an examining trial, and taking a "deposition" before an examining court. These differences are creatures of statute. "Evidence" on an examining trial is taken when the truth of the accusation is being inquired into, and to determine the question of bail, and by the magistrate alone, unaided by any of the officers enumerated in article 759 of the Code of Criminal Procedure. A "deposition" is taken at the instance of the accused, and in pursuance of different statutes from those prescribed for examining trials, and under entirely different rules of procedure. This will plainly and easily be seen by a casual reading of the cited statutes. "Testimony" taken on the examining trial is certified by the magistrate only, not as required in civil cases where depositions are taken, but in a different manner, and is filed with the district clerk for purposes stated <sup>338</sup> in the statute. "Depositions" are taken for the purpose of be-

ing used in future trials, when the proper predicate is laid: Code Crim. Proc., arts. 772, 773. Examining trial evidence could always be taken by the state, under the statute, but "depositions" never, until 1879, by virtue of article 774. In fact, the evidence taken in examining trials was never authorized by statute to be used in this state by either the accused or the prosecution until 1866, and then it was confined expressly to the accused and by him, then, only when it was shown that the witness giving the said testimony was dead. This right or privilege has never been accorded the prosecution, unless by virtue of article 774 of the Code of Criminal Procedure. In *Kerry v. State*, 17 Tex. Crim. App. 178, 50 Am. Rep. 122, it was held that the word "deposition," in article 774 was by mistake used for the word "evidence" or "testimony"; and by this construction the right to use "examining trial testimony" was accorded the state, upon predicate laid, as provided in article 772 of the Code of Criminal Procedure. And this construction, it was said by the court, "is put beyond all question by reference to the original act of 1866, from which article 774 was taken": *Kerry v. State*, 17 Tex. Crim. App. 178; 50 Am. Rep. 122. Other cases in this state follow and support this case. The act of 1866 reads as follows: "In all criminal prosecutions, when the testimony of a witness has been reduced to writing, signed and sworn to before an examining magistrate, or before any court, and the witness has died since giving his testimony, the testimony so taken and reduced to writing may be read in evidence by such defendant, as proof of the facts therein stated, and upon any subsequent trial for the same offense; provided, however, that in all other respects, the testimony of such deceased witness shall be subject to the established rules in criminal cases. In every case, the death of the witness must be established to the satisfaction of the court." This statute, it will be seen, has no reference whatever to a "deposition," provided for in articles 757 to 771, and absolutely excludes the idea that such "testimony" is a "deposition." When the statute was repealed, as was done by the Revised Statutes in 1879, this privilege was withdrawn from even the defendant. Article 774 was added to the Code of Criminal Procedure, upon the recommendation of the revisers in the following language, to wit: "Title 8, chapter 8. Of Depositions, etc. No material changes are made, except in the addition of article 774": Willson's Criminal Procedure, 13. (Report of Commissioners). This title and chapter have reference exclusively to "depositions." Can it



be gathered from this recommendation the revisers intended to substitute article 774 for the act of 1866 (2 Paschal's Digest, art. 6605), or that the legislature did in fact substitute it for said act, by carrying the recommendation of the revisers into effect? I think not. The language of the revisers is free from ambiguity, and clearly conveys the idea that article 774 was an addition to the chapter, relating only and exclusively to depositions. The word "deposition" has a well-ascertained meaning as used in the Code of Criminal Procedure, and excludes the idea that "testimony" taken in an examining trial, under article 267 of the Code of Criminal Procedure, was intended to be, or is, included <sup>339</sup> within that meaning. In using the term "deposition" in article 774, it was intended to confer upon the state the privilege of taking the character of testimony mentioned, in the same manner and under the same forms and procedure as conferred upon the defendant in similar cases. It employs language only appropriate to this end, and for this purpose. In requiring the deposition, under said article 774, "to be certified according to law," it evidently meant that the deposition should be taken and certified as when taken by the accused; that is, by the officer or officers mentioned in article 759, and in accordance with other requirements of the other statutes in regard to depositions. The reasons for this conclusion would be equally as cogent, if not stronger, should it be conceded that the act of 1866 was repealed by substituting therefor article 774, because the latter act employs language and terms totally at variance with the former, and excludes the idea that the examining trial evidence provided for in the former act was meant or could have been intended by the terms of the latter act. The word "deposition" has not been used to mean "examining trial evidence" in any legislative act in the Code of Criminal Procedure, in its history, so far as I have been enabled to ascertain. For the first time in this state, article 774 permitted the state to take depositions in a criminal case for the purpose of using same on some subsequent trial thereof, and it was by virtue of this statute alone that this practice was sought to be introduced into the criminal jurisprudence of Texas by legislation. Depositions in criminal causes were unknown to and unauthorized at common law. Therefore, we could not look to that source for such a rule: *Johnson v. State*, 27 Tex. 765; *People v. Restell*, 3 Hill, 289, 296; 3 Russell on Crimes, 464; *Commonwealth v. Ricketson*, 5 Met. 412, 427; 1 Chitty's Criminal Law, 585; 1 Bishop's Criminal Procedure, 1st ed., sec. 1090,

et seq. The "testimony" taken in an examining trial, under the provisions of article 267 of the Code of Criminal Procedure, was not a deposition authorized to be taken under the provisions of articles 751, 771, or 774. I have discussed article 774 as being within the legitimate creative power of the legislature, and not an infringement of the constitutional provision requiring the accused to "be confronted with the witnesses against him." I therefore think the decision in *Kerry v. State*, 17 Tex. Crim. App. 178, 50 Am. Rep. 122, is erroneous in holding that the word "deposition" means "testimony" taken on an examining trial, and, if this character of evidence can be used by the state at all, it must be taken as a "deposition." In this connection I may further say that this court has not been settled in its opinions in regard to this matter. In reviewing the right of the state to use examining trial evidence of witnesses who, at the time of the final trial of the case, were beyond the limits of the state, this court said: "The admission of this character of testimony rests solely upon necessity, and the rule as to its admission is an innovation upon the constitutional guaranty that in all criminal cases the accused shall have the right to be confronted with the witnesses against him": *Steagald v. State*, 22 Tex. Crim. App. 464-490. Authorities cited: *Johnson v. State*, 1 <sup>340</sup> Tex. Crim. App. 333; *Sullivan v. State*, 6 Tex. Crim. App. 319, 342; 32 Am. Rep. 580. If this be true, such testimony was admitted as a "necessity," and not under article 774. The doctrine of these cases would eliminate said article 774, whether the *Kerry* decision be right or wrong, because that statute would be "an innovation upon the constitutional guaranty that in all criminal cases the accused shall have the right to be confronted with the witnesses against him"; and the rule would exist by necessity, "judicial necessity," and not by virtue of the said article. If "deposition" and "examining trial evidence" mean the same thing, and are "innovations" upon the constitutional inhibitions or guaranteed rights, it must follow that the statute is void.

I have discussed this statute upon the hypothesis that it is not a violation of the tenth section of the bill of rights, and the legislature is authorized to ingraft exceptions upon the provisions; and, having done so, the state must pursue the procedure set out in the statute; and, having failed to do so, the evidence was inadmissible. But I do not believe the legislature is empowered to enact any law authorizing the state to reproduce the evidence of a witness under any state of case, unless the accused

has waived his right in some way, because it would be a violation of the constitution. Section 10 is as follows: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury." To render this still more emphatic, the constitution further ordained, by section 29, that, in order "to guard against transgressions of the high powers herein delegated, we declare that everything in this bill of rights is and shall forever remain inviolate, and all laws contrary thereto, or the following provisions, shall be void." When antagonistic to "these rights," no law or rule of evidence can rightfully stand, and where there is a doubt of the constitutionality of the law, impinging these rights, or apparently impinging them, that doubt should be solved by holding the law unconstitutional: *Lynn v. State*, 33 Tex. Crim. Rep. 153. And this rule is well settled, and has been followed in this state with singular tenacity, except when the accused is to be confronted with the witnesses against him. Three of these "rights" are enumerated in the same sentence, included between the same grammatical periods, to wit: "He [the accused] shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; shall have compulsory process for obtaining witnesses in his favor." The courts have thus far religiously interfered with any and all encroachments upon the first and third of these rights, but have found many excuses for upholding violations of the other. I am unable to appreciate <sup>341</sup> these reasons, though they have the sanction of great jurists and exalted courts. The principal reasons given in the decisions seem to be based on necessity, the rules of evidence known to the common law; and, having been once confronted with the adverse witnesses, the constitutional requirement has been complied with, and the accused can be thereafter confronted with examining trial evidence, or the oral testimony of such witnesses, reproduced through the mouths of others who may have heard them testify. There are many decisions sustaining one or more of these judicial exceptions. I do not purpose ex-



amining these decisions in detail. I have neither the time nor the inclination to do so. They are familiar to the profession. I shall only notice these questions in a general way. The bill of rights declares that, "in all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor." Who is to be tried? The accused. When? In "all criminal prosecutions." What is the character of this trial? "A speedy public trial." By whom is he to be tried? "An impartial jury." Can there be any want of certainty as to these propositions? I think not. It is too plain for discussion that these "prosecutions" are to be had before a jury—"an impartial jury." Whatever else this provision may mean, it does mean a trial before a jury. Otherwise, these provisions of the constitution are meaningless, and have an occult or hidden meaning not apparent on the face of the language employed, and which must be sought elsewhere. It is as clear, as positive, as certain, as definite, that the accused "shall be confronted with the witnesses against him in all criminal prosecutions," as it is that he shall have his trial before "an impartial jury," or that he shall have "compulsory process" for his witnesses, or be heard "by himself or by his counsel, or both," or to be tried on an "indictment" preferred "by a grand jury." The "criminal prosecutions" pertaining to one of these rights applies with equal force and cogency to any and all the others. If one right can be satisfied by the accused having once enjoyed it, then I see no reason why each cannot be satisfied in the same way and for the same reasons. "An impartial jury" is not an "examining court." It is not a habeas corpus proceeding, nor is it a rule of evidence known to the common law. To give this expression the meaning intended by the constitution, the provision under discussion should read as follows: "In all trials before a jury in all criminal prosecutions, the accused shall be confronted with the witnesses against him." The other two clauses in regard to compulsory process for the witnesses of the accused, and his right to be heard by himself and his counsel, are taken in this sense. Speaking of this section of the bill of rights, this court said: "Evidently, these matters all relate to proceedings in the trial court": *Tooke v. State*, 23 Tex. Crim. App. 10. This can mean nothing less than that, on the trial in a criminal prosecution, before a jury, <sup>342</sup> the accused shall be

confronted with the witnesses adverse to him. It is unquestioned that "he shall be present" at the trial to confront the witnesses. Why, with equal cogency, are not the witnesses required to confront the accused on that trial? The word "confronted" applies as well to the witnesses as to the accused. Under that term the presence of the accused is required, and there is no apparent reason why it should have a different meaning when applied to the witnesses. How can it be held to require the presence of the accused, and excuse the attendance of the witnesses against him? There must be an accused, and there must be witnesses to confront him. If the accused be absent, and the witnesses present, there could be no trial. There might be a forfeiture of a bail bond, but not a trial of the accused in the "prosecution." If the accused presents himself at the trial, and there are no "witnesses against him," there would still be no trial. Not only so, but an examination of the witnesses cannot be had, even if the accused be only temporarily absent during the trial: *Bell v. State*, 32 Tex. Crim. Rep. 436, and cited authorities; *Rudder v. State*, 29 Tex. Crim. App. 262. The constitution demands the presence of both the accused and the witnesses. The legislature seems to have had the same conception of this provision, for it enacted that "the defendant upon a trial shall be confronted with the witnesses, except in certain cases provided in this code, when depositions have been taken": Code Crim. Proc., art. 25. I am assuming that the "trial" specified in this statute (Code Crim. Proc., art. 25), means a trial before a jury, and the "witnesses" mentioned are those "against him," though this must be arrived at by intendment and construction. It is not so stated in the statute, nor is this meaning anything like so clear as that shown by the constitution. The "trial" of the constitution is a trial "by an impartial jury," and it is clear to my mind that the law-making power so understood it, if the statute (Code Crim. Proc., art. 25) means a trial before a jury by the expression "upon a trial." A "trial" before a "jury" is not a trial before an examining court, or under the writ of habeas corpus. If it be true that the statute refers to jury trials, how much stronger and more cogent is it that the constitution means a "jury trial." If the expression "by an impartial jury" be supplied by intendment in the statute to convey the idea that a jury trial is there meant, how can the expression "by an impartial jury" be stricken from the constitution, by interpretation, in order to deprive the accused of the right of being confronted with

the state's witnesses? It would, indeed, be a strange rule of interpretation that would permit the elimination of the plain meaning of terms and words used in the constitution, and yet supply a similar meaning to language in the statute, not so certain in its significance and meaning. I see no room for construction as to the constitutional provision, for it uses words which convey a plain purpose or object. Again, the witnesses alluded to in the statute are not specifically designated; in the constitution they are. By intendment it may be held that the witnesses against the accused are meant in the statute, but it is not so written in terms. We can only hold it so <sup>343</sup> by construction, and thus be enabled to reach the conclusion that such was the intention of the legislature. If this is correct, the constitution and the statute mean the same thing.

One word with regard to the expression, "Except in certain cases, provided for in this code, where depositions have been taken." What does this mean? By referring to articles 757-771, inclusive, we find that it means only to authorize the accused to take depositions in an "examining court," or where the witness is absent from the state, or is aged and infirm, under circumstances there specified. When so taken, the accused is required to consent that the state may use the depositions, and the prosecution has the right of cross-examining the witnesses whose depositions are taken. Then, it seems to be clear that the "evidence" taken by a justice of the peace on an examining trial is not a deposition: Code Crim. Proc., arts. 267, 757-771. Such "evidence" is, therefore, not only prohibited by the constitution, but excluded by the statute. Depositions were unknown to the rules of common law. Therefore, we cannot look to that source for any light: *Johnson v. State*, 27 Tex. 765; *People v. Restell*, 3 Hill, 289, 296; 3 *Russell on Crimes*, 9th ed., 464; *Kaelin v. Commonwealth*, 84 Ky. 354. But, if they were, they would be excluded by the statute, because it expressly confines such testimony to depositions taken under provisions of the code: Code Crim. Proc., art. 25. The language of article 25 is exclusive, and requires the accused to be confronted with the witnesses "on the trial," except in cases where depositions are taken under the provisions of the code. It does not recognize depositions provided by English statutes. Our statute provides: "The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state except where they are in conflict with the pro-



visions of this code, or of some statute of the state": Code Crim. Proc., art. 725. There is no provision of law in our codes recognizing English statutory depositions. We are confined to common-law rules of evidence when not in conflict with our procedure. It is also enacted that "the rules of evidence prescribed by the statutes of this state, in civil suits, shall, so far as applicable, govern also in criminal actions, when not in conflict with the provisions of this code or of the Penal Code": Code Crim. Proc., art. 726. It is further provided by statute that, "whenever it is found that this code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern": Code Crim. Proc., art. 27. Then it would follow that no matter of procedure or rule of evidence known to the common law would have any standing in this state, in criminal cases, when our codes have provided rules in regard to the particular question. If the rule be the same under the statute as at common law, then the statute occupies the territory, and it is a rule in law, as in physics, "that two bodies cannot occupy the same space at the same time," and for this reason the statute must prevail. If they be antagonistic, then, of course, the statute expressly excludes the common <sup>344</sup> law. So, in either case, the common law must yield. Neither the statute nor the common law can in any event supplant the constitution. This constitutional provision excludes all rules of evidence, statutory as well as common law, if antagonistic to its letter, meaning or intent. A rule of evidence "known to the common law of England" cannot supplant the statute. Much less can it override and annul the bill of rights, even if the legislative power had sought to accomplish that purpose. But this has not been, nor sought to be, done by legislative enactment, as I understand the statute. The error lies in judicial construction. We have our own examining courts; and if testimony taken before these courts are "depositions," then they are admissible, if at all, only under the statute; and if not depositions, they are excluded by article 25: Authorities above cited.

As I understand the history of legislation in this state, examining trial evidence was never admissible for the state by statutory enactment. In 1866, an act was passed authorizing the use of such evidence by the accused, but then only by proof of the death of the witness who gave it: Paschal's Digest, art. 6605. But this act was repealed in 1879, and now is but a historical reminiscence, even the defendant being debarred this right or

privilege. Therefore, I cannot see how it can be held that "examining trial evidence" is admissible, even under the statute. But I have discussed this previously. The right to be confronted with the witnesses against him is a right guaranteed by the constitution to the accused—is not a rule of evidence. This right begins with and continues throughout the "prosecution," whenever the accused is placed on trial before a jury, as to his presence during every stage of that trial, and is coextensive with his right to have compulsory process for his witnesses, to be tried upon indictment in felony cases, and to be heard by himself and counsel. These are continuing rights, and cannot be obliterated because once made operative in the course of a given prosecution. That hung juries, new trials, or reversals do not satisfy these requirements, if the accused is again placed on his trial under the same indictment, is conceded as to all other rights save the one at issue, and this by all the authorities. Then, why not so as to this provision? If it is otherwise in this instance, and this provision be an exception, it should have been specially so provided in the constitution. But it was not. Then the scope, duration, and authority of these provisions are the same, and cannot be otherwise, if we adhere to the plain terms and positive language employed in setting forth this right. If a necessity exists to set aside this right, or any of these rights, in any emergency, it is found outside and beyond the terms of the constitution, and not in any language therein set forth. It must come from some higher source, to be supplied by the interpreting power. Whence cometh it? It is said that it originated in and comes from necessity; that it is inherited from the common law, and from the fact that the accused has once been confronted with the witnesses against him. Some courts adopt one of these theories, others, another, and some adopt all three, and superadd the <sup>345</sup> matter of public policy, as a sort of "roseleaf to the brimming goblet." "Necessity" has afforded a broader ground, perhaps, than the other reasons for the decisions admitting this class of evidence. It has its origin, of course, in the idea that the constitution must be relaxed in some way in order to admit this character of evidence. Necessity that is higher than the constitution can safely have no place in American jurisprudence. That principle is necessarily vicious in its tendency, and subversive of the constitution. It should be, and is, limited by the constitutional inhibitions. This is the settled rule in this state, except, perhaps, in regard to confronting the accused with the

witnesses for the prosecution: *Lynn v. State*, 33 Tex. Crim. Rep. 153; *Ex parte Garza*, 28 Tex. Crim. App. 381; 19 Am. St. Rep. 845; *Ex parte Sundstrom*, 25 Tex. Crim. App. 133; *Bohmy v. State*, 21 Tex. Crim. App. 597; *Flood v. State*, 19 Tex. Crim. App. 584. The exception referred to is supported by *Johnson v. State*, 1 Tex. Crim. App. 333, *Black v. State*, 1 Tex. Crim. App. 368, *Steagald v. State*, 22 Tex. Crim. App. 464, and other cases. These decisions sustain this exception principally upon the broad ground of necessity, but admit that this "necessity" is an innovation upon the constitutional guaranty "that in all criminal cases the accused shall have the right to be confronted with the witnesses against him": *Steagald v. State*, 22 Tex. Crim. App. 468-490. In *Sullivan's case*, it was admitted on the ground of "judicial necessity": *Sullivan v. State*, 6 Tex. Crim. App. 319-342; 32 Am. Rep. 580. Why should the necessity exist as to this, and not as to the other provisions? The reasons are not obvious. But, if correct, these decisions establish the proposition that there is a necessity higher than and beyond the constitution, and out of which this rule must come. Being correct, that necessity must govern and control the constitution. If it in fact exists, the judiciary, legislature, and executive owe it allegiance, and must conform to its behests. As its boundaries have not been and cannot be settled, because of a want of controlling authority, it follows that each department may exercise its high functions as may seem to it proper, guided alone by its own will, or its determination of the emergency which may call it into existence. The judiciary may take one view of it, the legislature another, and the executive still another, and each antagonistic to and subversive of the other. Thus each of these co-ordinate departments may find "necessities" outside the organic law, destructive of the authority of the other two and of that law itself. If this "necessity" exists, the constitution ceases, and the necessity usurps its place and functions, and becomes a "higher law," to be exercised at the pleasure of the department assuming the existence of the necessity. If the courts can assume it for one reason, they may do so for any number of reasons, and until all of the provisions of the constitution are nullified, and its existence terminated; and hence the extinction of the courts themselves, or the establishment of their complete and absolute autonomy, independent of the constitution. The power to create a necessity superior to the constitution necessarily implies and carries the authority to supersede it. The constitu-



tion, and a controlling <sup>346</sup> necessity antagonistic to its requirements, cannot exist. One must yield, and this, of course, must be the necessity, though some decisions hold the other way. These decisions, in my judgment, are erroneous, and should not be permitted to stand. But this character of evidence is said to have been admissible at common law, and therefore admissible with us. If it be conceded that it was permitted at common law, it does not follow that it is so here. While the English practice may have admitted depositions in criminal cases, this seems to have rested on statutes, and it cannot be easily shown from the cases that parol evidence of what was sworn on a previous trial was used upon a subsequent trial: *People v. Sligh*, 48 Mich. 54; and authorities cited. In that case it was further said: "It must be confessed, also, that although the English practice has always been to allow depositions of deceased witnesses in ordinary criminal cases, a contrary rule seems to be recognized in treason cases, upon the ground that there the statutes provide—as they nowhere else provide, but as our constitution provides in all cases—for confronting prisoner and witnesses on the trial": See, also, 1 Hale's Pleas of the Crown, 306, 586; 2 Hale's Pleas of the Crown, 286; 3 Russell on Crimes, 9th ed., 437, and note a; Foster on Criminal Law, 236, 328; 1 Chitty on Criminal Law, 585. This practice, in England, is founded and rests upon statutes. Those who maintain a common-law rule assert that, if the accused has once been confronted, the evidence of the witness may be reproduced, if he is dead, insane, kept away by the adverse party, or is too infirm to be able probably ever to attend the trial. If this proposition is correct, this clause of the constitution should read as follows: "The accused shall be confronted with the witnesses against him, except where he has once been so confronted, and the witnesses have died, become insane, have been kept away by the adverse party, or are too infirm to probably ever be able to attend the trial." If such is the meaning of the constitution, very singularly inappropriate language was employed to convey that meaning, and we must seek elsewhere than the terms of that instrument for its meaning. I am cited to the recent decision by the United States supreme court in *Mattox v. United States*, 156 U. S. 237, in which it is said: "We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted; not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—

such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected." This exception announces some propositions which to my mind are not in harmony with the "spirit" of our government and constitution, and certainly not found in the "letter" of that instrument. I do not understand how our constitution, a novelty in governmental experience and science, wholly unknown to the common law, or the "law as it existed," could be interpreted <sup>347</sup> by that law. It is not clear how "many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the constitution," when there was no bill of rights to which these "exceptions" could relate. There must be an existing law before there can be exceptions to it. Not only so, but our theory of government is constructed upon a basis fundamentally at variance with the principles of the British government, and is constructed upon the theory that citizenship is the creative power of government, that all governmental authority and power in the states is derived from the people, and that there is no power above the constitution, except the people who created it. In other words, ours is a constitutional government, in the states ordained by the people, and the federal constitution one of delegated authority conferred by the states. How, it may be asked, can the delegated authority of the federal government be inherited by that government as a British subject? The federal authority, in all its bearings and extent, is exercised alone by virtue of the terms of the federal constitution, and that constitution is the act of the states. It inherited nothing. Its powers are conferred. It is the creature of the states, not the child of the common law, nor was ever the subject of the British government.

Again, the common law, or "the law as it existed at the time" our constitution was brought into existence, never conceived of a constitution such as inaugurated in the states or for the federal government? It would be much more plausible to construe away the freshly-acquired rights of the English "subjects," wrung from King John, and embodied in Magna Charta, by "the law as it existed at that time," than to interpret away, by common law, those rights reserved by our people in their respective bills of rights and constitutions. As Magna Charta reached out for

“new guaranties of the rights of the citizen,” secured in that memorable struggle of the English people for their liberties, so our constitution was “reaching out for new guaranties of the rights of the citizen,” after the great struggle which gave the American people in the thirteen colonies their independence. Not satisfied with the Magna Charta of English liberty and rights, the American people ordained and instituted a Magna Charta of their own rights and liberties, in the form of written constitutions, and in them made a forward movement in guaranties of reserved rights, some of which were unknown to the “law as it existed at that time” of their adoption. Allegiance “as British subjects” was renounced, and those rights were declared which conformed to the views of the American people as an independent people. They did not subordinate themselves to the laws of the country from which they had so recently forcibly separated themselves. There is nothing on the face of the federal constitution, or that of this state, recognizing the rules of inheritance “as British subjects.” Again, if it be granted that the rules of evidence known to the common law were left in vogue at the time of its adoption by a failure of the federal constitution to speak of them, then may it not be said that, when the sixth <sup>348</sup> amendment was added to that instrument, it excluded those rules by requiring the “accused to be confronted with the witnesses against him,” without qualification or exception? The inclusion of the “confronting clause,” minus the four exceptions said to exist at common law, would exclude those exceptions: *People v. Sligh*, 48 Mich. 54; 3 Russell on Crimes, 9th ed., 437, and note a. Texas, however, could not have inherited as a British subject. She came from another source. Her inheritance, if a successful revolutionary child can be forced to take an encumbrance against its will, came from the civil-law source. What of the common law we have is by adoption, not by inheritance, and its standing with us is solely by legislative enactment. Again, it has been decided that, if the accused has once been confronted with the witnesses against him, this satisfies the constitutional demand, and thereafter their testimony may be reproduced without such confrontation. In this event it may be relevant to ask what becomes of the “rules of evidence known to the common law,” as well as the rule of “necessity.” In regard to this rule it is said, in *Mattox v. United States*, 156 U. S. 237, that “the substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the



witness face to face, and in subjecting him to the ordeal of a cross-examination. This the law says "he shall under no circumstances be deprived of." This same law, which says "he shall under no circumstances be deprived of meeting the witness face to face," draws no distinction between the first trial and subsequent trials. It guarantees that right in all criminal prosecutions "before an impartial jury." The rights are none the less sacred because there has been one trial. The law does not select the first trial as the place and time of the confronting of the accused with the witnesses. This is judicial selection. Why is this? If once "confronted" means a compliance with the demands of the constitution in regard to this right, why not apply the same rule of interpretation to those other provisions of section 10 of the bill of rights? What occult reason is there for this difference in the force and operation of those provisions? Why not, upon a subsequent trial, try the accused before the court without a jury, in private, without indictment, deny him process for his witnesses, refuse him the right to be heard by himself and counsel, and try him in his absence? Why were not the "substance" of these constitutional rights preserved to the accused in the advantage of having once enjoyed them, as well as in once seeing the witness "face to face"? The law draws no line of demarkation, but places them on the same plane, and declares they all shall "forever remain inviolate." If the accused's being once confronted by the adverse witness meets the constitutional demand, then it would be unnecessary to bring that witness again to another trial. His evidence could be proved by another who had heard him testify, though the witness then sat in the courtroom. Why? Because the constitution has "once" been complied with, and its demand met, and has no further operation in the given case. This is the legitimate outcome of the doctrine under discussion as maintained by those decisions.

**340** At common law, and until Queen Anne's time, the accused in felony cases was not entitled to produce witnesses in his behalf, nor was he permitted to have counsel for his defense. "It is a settled rule at common law," says Mr. Blackstone, "that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated": 4 Blackstone's Commentaries, sec. 355. Again, he says: "It was an ancient and commonly received practice that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate

himself by the testimony of any witnesses": 4 Blackstone's Commentaries, sec. 359. "The prisoner was not even permitted to call witnesses, though present, but the jury were to decide on his guilt or innocence, according to their judgment, upon the evidence offered in support of the prosecution": 1 Chitty on Criminal Law, 624, 625. The accused, therefore, at common law, could have no compulsory process for witnesses in his favor: *Reynolds v. State*, 33 Tex. Crim. Rep. 143; 47 Am. St. Rep. 25; *Kidwell v. State*, 35 Tex. Crim. Rep. 264. No decision that I am aware of has yet laid down the rule that, if the accused has once been heard by himself or counsel, or has had compulsory process for witnesses in his favor, these constitutional rights were for this reason inapplicable to subsequent trials of the same case. Yet these demands are of no higher standing than that which requires the accused shall be confronted with the witnesses against him, or that, having been once enjoyed, the common-law rule refusing them could be invoked. Such a ruling would not be in accordance with the due process of law. No rule can be due process of law which ignores legal justice, or which clearly sets at naught the plain letter of the law. We cannot reach the ends of legal justice by setting at defiance those rules prescribed for attaining it. We cannot hope to enforce and preserve the constitution by setting aside and overriding its plainly written requirements, and violating its imperative demands. It is not right to wrong, and the constitution is not maintained by overturning it. The three grounds by which it is said testimony of witnesses can be reproduced upon a subsequent trial, without confronting the accused with the adverse witnesses, are at variance with each other. If either be correct, the others, it would seem, cannot be. "Necessity" knows no exceptions, save those imposed by the dispensing power. The common law is said to be limited by four exceptions, and having once confronted the accused with the adverse witnesses fully satisfies the constitutional demand; hence, it ceases to be operative. In some cases, notably *Mattox v. United States*, 156 U. S. 237, all of these rules are sanctioned, inconsistent as they are. All of them are outside, and beyond, and antagonistic to the constitution, as well as to each other. The rule of interpretation adopted in the *Mattox* case is at variance with that followed by our courts, coeval with the existence of the judicial system of our country with reference to the interpretation of the plainly written terms of constitutions.

Be it remembered that the interpretation of constitutions is peculiarly <sup>350</sup> a phase of American jurisprudence. It originated with us. It had no existence elsewhere. It is not subject to "the law as it existed before"; neither, indeed, can be. We get but little light elsewhere, and this is derived from the rule by which written contracts are construed. The common law cannot furnish us the rule, for it did not deal with an American constitution. Such an instrument was never within the purview of, or contemplated by, its rules—was a stranger to its growth, development, economy, and its philosophy. Mr. Cooley says: "In American constitutional law, the word 'constitution' is used in a restricted sense, as implying the written instrument agreed on by the people of the Union, or of any one of the states, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void": Cooley's Constitutional Limitations, 5. The rule of its interpretation seems to be the same as that applicable to a written contract, and when the language is plain, direct, and certain, its terms alone should be looked to, and resort to extraneous matters should be excluded. This rule of interpretation has obtained, as I understand it, from the inception of our government. Mr. Story says: "When the words are plain and clear, and the sense perfect and distinct arising on them, there is generally no necessity to have recourse to other means of interpretation": Story on the Constitution, secs. 182-184. "The general principle, on which we have heretofore insisted, that the meaning of a written law is to be found in its terms, and that we are not at liberty to resort to extrinsic facts and circumstances to ascertain what the framers might have intended, has frequently been declared to apply to the constitution": Sedgwick on Statutory and Constitutional Law, 2d ed., 552. In *Sturges v. Crowninshield*, 4 Wheat. 202, 203, Chief Justice Marshall said: "It is well settled that the spirit of a constitution is to be respected no less than its letter; yet that spirit is to be collected from its words, and neither the practice of legislative bodies nor other extrinsic circumstances can control its clear language." In *Newell v. People*, 7 N. Y. 9, it was said: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view of interpretation, the thing which we are to



seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural significance of the words employed, in the order of grammatical arrangement, in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between the different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither legislatures nor courts have a right to add to or take away from that meaning." This rule was again<sup>261</sup> declared by the supreme court of the United States in *Lake Co. v. Rollins*, 130 U. S. 662; hence, has an unbroken array of authority supporting it. In that case the court say:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At first glance, its reading produces no impression of doubt as to the meaning. It seems all-sufficiently plain, and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement, in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it: *Newell v. People*, 7 N. Y. 9; *Hills v. Chicago*, 60 Ill. 86; *Denn v. Reid*, 10 Pet. 524; *Leonard v. Wiseman*, 31 Md. 201-204; *People v. Potter*, 47 N. Y. 375; *Cooley's Constitutional Limitations*, 57; *Story on the Constitution*, sec. 400; *Beardstown v. Virginia*, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or lim-

ited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction: *United States v. Fisher*, 2 Cranch, 358, 359; *Doggett v. Railroad Co.*, 99 U. S. 72. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. Such considerations give weight to that line of remark of which *People v. Purdy*, 2 Hill, 31-36, affords an example. There, Bronson, judge, commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: 'In this way the constitution is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter; 352 and that, too, when the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we lose sight of the instrument itself, and roam at large in the boundless fields of speculation.' " For one I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value, if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. "Words are the common signs that mankind make use of to declare their intention to one another; and, when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation." For additional authorities, see 3 *American and English Encyclopedia of Law*, 379, note 1. I have thus liberally quoted from this decision because it presents the rule of interpretation applicable to the provision of the constitution under discussion in the case under consideration. The rule in the *Mattox* case is inappropriate in a case where the meaning is plain on the face of the instrument. Rules of construction should never be resorted to, nor rules of interpretation

invoked, unless a necessity exists therefor; and Vattel says: "It is not allowable to interpret what has no need of interpretation": *Beardstown v. Virginia*, 76 Ill. 34-40; *Cooley's Constitutional Limitations*, 55. Again, the proposition is a sound one that courts, in the interpretation of constitutions, have nothing to do with the argument *ab inconvenienti*, and should not "bend the constitution to suit the law of the hour": *Greencastle Tp. v. Black*, 5 Ind. 557, 565; *Oakley v. Aspinwall*, 3 N. Y. 547, 568. That inconvenience may and will arise from an adherence to the constitution may be conceded, but this affords no reason for construing away its provisions. It is not for the courts or legislatures to supply these defects. This is for the people who made that instrument. As was said by Bronson, chief justice: "If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is declared, the people may well despair of ever being able to set any boundary to the powers of government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be obtained, by pushing the powers of government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written regardless of consequences. If the law does not work well, the people can amend it; and the inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary <sup>353</sup> in enlarging the powers of government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of government are just what those in authority please to call them": *Oakley v. Aspinwall*, 3 N. Y. 547. The evils of such a rule are too obvious to require enumeration or discussion at my hands, and courts should set upon it the seal of judicial disapprobation. Let the people who made the constitution remedy its defects, as they alone have



the right to do. But I do not admit the constitution is defective in the matter under discussion. The rule of stare decisis has but little application in criminal jurisprudence, and ought to have none, when wrong and tending to overturn the plainly written law. May it not be said correctly, in criminal law, in this connection, that adjudicated error, persisted in, cannot make truth of that error? Can any question, truthfully be said to be settled until it has been correctly settled? Courts may declare it settled, but those rulings will be questioned and assailed until they are overturned, and the truth is made to prevail. This is right, and it should be so. In criminal jurisprudence, the courts are largely unencumbered with "rules of property rights" involved in the rule of stare decisis. It is error to say that the provision of the constitution under discussion is a "rule of evidence," and subject to exception, if to be judged by the ordinary rules of interpretation applicable to contracts, couched in plain and unambiguous language and terms. This provision is not a rule of evidence, announces no rule of evidence, but is prohibitory of all rules of evidence contrary to its terms, as well as all matters of procedure violative of its requirements. If this provision of the bill of rights means anything, and article 25 of the Code of Criminal Procedure is a valid law, then the "testimony" taken on an examining trial cannot be used as original evidence on a final trial of the case, or any subsequent trial thereof. The witnesses against him must confront the accused, or in a proper case, the "depositions" authorized by the statute can be used; and neither the constitution nor the statute authorizes the admission of examining trial evidence, but both prohibit its introduction. If such evidence can be admitted at all, under any rule, it would constitute an excuse for not confronting the accused with the witnesses against him. Inability of the state to comply with the law can constitute no excuse for its violation, much less would it authorize an overturning of the constitutional inhibitions. Those cases which hold this character of evidence admissible on the ground that the rules pertaining to the introduction of testimony in civil and criminal cases are the same, in my opinion, are not correct. The constitution does not require the production of witnesses in open court, in civil suits, as it does in criminal prosecutions, and the statute excludes rules of evidence in civil cases, if in conflict with those prescribed by the Code of Criminal Procedure for the trial of criminal actions: Code Crim. Proc., art. 726; *People v. Sligh*, 48 Mich. 54.

In view of the fact that the reasons for confronting the accused with <sup>354</sup> witnesses against him have been so often discussed, it would seem useless to enter that field and rediscuss them. For an able exposition of the reasons, see the strong dissenting opinion of Judge Ryland, in the case of *State v. McO'Blenis*, 24 Mo. 402, 69 Am. Dec. 435, and the very able and exhaustive brief of Mr. Wright, of counsel for the appellant in said cause. I do not see how the jury are fully enabled to pass upon the weight to be attached to the evidence and credibility of the witnesses unless they have had the opportunity of seeing them face to face, and hearing them detail their testimony. A just verdict in this respect is incidental to the accused being confronted by said witnesses, and seeing and hearing them is necessary to a correct weighing of their evidence. The manner of testifying, appearance, expressions of countenance, evasion, candor, sudden confusion when detected in a fabricated tale or false statement, are as potent in the minds of the jury, and often more so, than the words used by the witnesses; and yet these things cannot be reproduced before the jury, and, if sought to be reproduced might be excluded, because they would but form the basis for the opinion of the reproducing witness. An intelligent and safe conclusion by the jury as to the credibility of the absent witness would, therefore, in such state of case, be impossible; and a fair verdict on the weight of his evidence precluded. It is in all human probability absolutely impossible to reproduce the testimony of an absent witness, for his excluded demeanor, during the time he is testifying, is as much a part of his testimony as the language he uses in detailing his knowledge of the facts stated by him. I have not intended to discuss the rules applicable to the admission of dying declarations, *res gestae*, nor what might constitute a waiver by the accused of the presence of the witnesses against him, nor where the accused has kept away from his trial those witnesses who are adverse to him.

Reversed and remanded.

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MR. JUSTICE HENDERSON dissented and maintained that evidence taken before a magistrate, and offered on the trial of the same defendant on the same accusation, where the defendant was present, and had an opportunity to cross-examine the witness, who has since died, is in fact and law a deposition, and is admissible against the accused. He also maintained that evidence so taken was a sufficient confrontation of the accused with the witness giving it to satisfy the constitutional and statutory requirement upon that subject, and that if such witness is dead at the time of the final or any

subsequent trial of the case, such evidence is admissible against the accused. Judge Henderson, in expressing his views, said, in part, as follows:

"To show how the matter stood at common law, I will quote from a few of the old English cases: Buckworth's case (decided in 1654, Michaelmas term, 20 Car. II; see T. Raym, 170), upon this point, is as follows: 'Information against Buckworth and others for perjury in ejectment. Defendants justified upon not guilty, and now, upon evidence to prove the perjury, one was produced to prove what one that is since dead swore upon the first trial; and by Kelying, chief justice, held: "It shall not be allowed, because betwixt other parties"; but Twisden and Morton contra, and it was allowed. In Pitton v. Walter (5 Geo. I; decided in 1718), 1 Strange, 162, Pratt, chief justice, said: "The bare producing the postea is no evidence of the verdict, without showing a copy of the final judgment, because it may happen that the judgment was arrested or a new trial granted; but it is good evidence that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial, who has since died.' In Radbourne's case (decided in 1787), 1 Leach C. C. 457, it is held: 'An information before a justice, made by deceased on oath, in the presence of the prisoner, may be given in evidence on the trial, though the informant was not apprehensive of death, and though the information be signed by one magistrate only.' In Rex v. Woodcock (decided in 1789), 1 Leach C. C. 500, Lord Chief Baron Ayre says: 'The most common and ordinary species of legal evidence consists in the depositions of witnesses, taken on oath before the jury, in the face of the court, in the presence of the prisoner, and received under all of the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two other species which are admitted by law. The one is the dying declarations of a person who has received a fatal blow. The other is the examination of a prisoner, and the depositions of the witnesses that may be produced against him, taken officially before a justice of the peace, by virtue of a particular act of parliament, which authorizes magistrates to take such examinations, and directs that they shall be returned to the court of jail delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that viva voce testimony, which the deponent, if living, alone could have given, and is admitted of necessity, as evidence of the fact.' In Rex v. Smith (decided in 1817), Russ. & R. 339, held: 'Deposition of the deceased held admissible in a case of murder, and though taken when the prisoner was charged with another offense, and although the greater part of it had been reduced into writing during his absence, it appearing that the deceased was afterward resworn in the prisoner's presence, the deposition then read over and stated by the deceased to be correct, and the prisoner asked whether he had any questions to put to defendant': See 2 Stark. 208, and 3 Eng. Com. L. 397.



Lord Ellenborough and three of the other judges stated, 'that they should have doubted the admissibility of the evidence but for the case of *Rex v. Radbourne*, 1 Leach C. C. 457,' cited *supra*. From *Regina v. Beeston* (decided in 1855), 29 Eng. L. & Eq. 527, we quote as follows: "The prisoner was charged before a magistrate with wounding A, with intent to do him grievous bodily harm, and A's deposition was taken. A afterward died of the wound, and the prisoner was indicted for his murder. Held, that, on the trial for the murder, the deposition of A might be read in evidence. Although it was not on the same technical charge, it was taken in the same case, and the prisoner had had full opportunity of cross-examination. Martin, B., used the following language in said case: "Our decision is in accordance with the case of *Rex v. Radbourne*, 1 Leach C. C. 457, and *Rex v. Smith*, Russ. & R. 339. There is nothing in the statutes to show an intention to alter the common law which rendered the deposition admissible, but I believe that, upon the language of the enactment itself, a deposition would be admissible." Crowder, judge, said: "I think the deposition receivable at common law and under the statute. It appears to me not to have been the object of the statute to restrict the common law. It is not necessary that the charge in the indictment should be the identical technical case charged before the justice." In *Regina v. Scaife* (decided in 1851), 79 Eng. Com. L. 237, the prisoner, Scaife, was indicted, together with Thomas Rooke and John Smith, for larceny. Evidence was given that, by the procurement of Smith, one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered. The evidence was admitted to be receivable as against Smith, but it was said that it was no evidence against Scaife and Rooke. The case came before the court of queen's bench, and it was held that the learned judge ought to have told the jury that the evidence applied to the case of Smith only, and not to that of either of the other prisoners. Coleridge, one of the justices, said: 'I always understood before the late statute that if a witness was dead or insane, or kept away by the procurement of the prisoner, his deposition was admissible, if properly taken.' The judges seem to have entertained no doubt as to the admissibility of the deposition as against Smith, who had spirited the witness away. Mr. Roscoe says: "That depositions are admissible as substantive evidence at common law should the witness be either dead (citing Hale's Pen. Code, 305; *Rex v. Westbeer*, 1 Leach C. C. 12; *Rex v. Bromwich*, 1 Lev. 180; 1 Salk. 281; Bull N. P. 242), or be in such a state as likely never to be able to attend the assizes (*Rex v. Hogg*, 6 Car. & P. 176, *Regina v. Wilshaw*, Car. & M. 145); or if the witness be kept away by the practices of the prisoner: *Regina v. Guttridge*, 9 Car. & P. 471': See 1 Roscoe's Criminal Evidence, 8th Am. ed., 104 (marg. p. 69).

"These cases show the state of the English law on this subject since the year 1654, and show how the courts of common law regarded the rule of evidence with reference to the right of the defendant

on a trial to be confronted with the witnesses against him. As the British constitution, in its unwritten law, contained this guaranty in every jury trial, so our government, national and state, when they came to adopt constitutions, following in the wake of the mother country, placed this provision as one of the guaranties of a defendant in every criminal prosecution. The clause or expression came to us as understood and defined in England; and when article 6 of the amendment to the constitution of the United States was adopted, providing 'that in all criminal prosecutions . . . the accused shall be confronted with the witnesses against him,' the framers of the organic law were advised of the meaning of said clause with reference to the rules of evidence in regard thereto; and, when the federal courts came to pass on the question, they gave it the same construction as to the reproduction of the testimony of a deceased witness as had heretofore been given to it by the English courts: See *United States v. Macomb*, 5 McLean, 296; Fed. Cas. No. 15702; *United States v. White*, 5 Cranch C. C. 460; Fed. Cas. No. 16679; *United States v. Wood*, 3 Wash. C. C. 440; Fed. Cas. No. 16756; *Mattox v. United States*, 156 U. S. 237. I quote from the latter case as follows: 'The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of the testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free, simply because death had closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the

adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of justice. As was said by the chief justice when the case was here upon the first writ of error (*Mattox v. United States*, 146 U. S. 140): "The sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." If such declarations are admitted, because made by a person then dead, under circumstances which gave his statements the same weight as under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath. The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes, and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.'

"As before stated, a great majority of the states of the American Union, in their constitutions, have a similar clause to the sixth amendment to the constitution of the United States; and so far as I am advised, without exception, in every state where the question has been presented, it is held that where a witness has once testified against a defendant on the same charge, whether in the examining court or at a former trial of the case, and has since died, his testimony can be reproduced: See *Roberts v. State*, 68 Ala. 515; *Pope v. State*, 22 Ark. 372; *Robinson v. State*, 68 Ga. 833; *Barnett v. People*, 54 Ill. 325; *State v. Wilson*, 24 Kan. 189; 36 Am. Rep. 257; *State v. Cook*, 23 La. Ann. 347; *Commonwealth v. Richards*, 18 Pick. 434; 29 Am. Dec. 608; *People v. Sligh*, 48 Mich. 54; *Owens v. State*, 63



Miss. 450; *State v. McO'Brien*, 24 Mo. 402; 69 Am. Dec. 435; *State v. Able*, 65 Mo. 370; *State v. Johnson*, 12 Nev. 121; *State v. Valentine*, 7 Ired. 225; *State v. Staples*, 47 N. H. 113; 90 Am. Dec. 565; *Summons v. State*, 5 Ohio St. 325; *Brown v. Commonwealth*, 73 Pa. St. 321; 13 Am. Rep. 740; *State v. DeWitt*, 2 Hill (S. C.), 282; 27 Am. Dec. 371; *Kendrick v. State*, 10 Humph. 479. The brief of the appellant's attorney and the dissenting opinion of Judge Ryland in *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435, are referred to in the opinion of the court as being an able exposition of the views entertained by the court. In my judgment, the opinion itself in that case is a complete answer to the proposition. I quote from said opinion, as follows: 'The people have incorporated into their frame of government a great living principle of the common law, under which they and their ancestors have lived; and it is the duty of the court so to construe it, as to make it effectual to answer the great purpose they had in view. And this principle, we think, is no other than the principle of the common law in reference to criminal evidence—that it consists in facts within the personal knowledge of the witness, to be testified to in open court, in the presence of the accused. This principle, however, was nowhere written down on parchment. It is not to be found in the Magna Charta or in the English bill of rights, but it existed in the living memory of men, and was always a part of the common law, although in bad times it was trodden under foot by bad men in high places. It is not, however, a stiff, unbending rule, extending to every case without exception, falling within its letter, but is limited and controlled by subordinate rules, which render it safe and useful in the administration of public justice, and are as well established as the great principle itself, which, with all its exceptions and limitations, was taken from the existing law of the land, and incorporated into the constitution. The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as a part of the law of the land from future change, by elevating them into constitutional law. It may as well be the boast of an Englishman living under the common law, as of a citizen of this state living under our constitution, that in a criminal prosecution he has the right to meet the witnesses against him face to face; and yet it was never supposed in England at any time that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances, nor indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule. It is said by Lord Aukland, in reference to the conduct of the British courts in the sixteenth and part of the seventeenth centuries: "Depositions of witnesses, forthcoming if called, but not permitted to be confronted with the prisoner, written examinations of accomplices, living and amenable, confessions of convicts lately hanged for the same offense, hearsay of these convicts repeated at second hand from others, all formed so many classes of competent evidence, and were receive-

ed as such in the most solemn trials by learned judges": Principles of Penal Law, 2d ed., 187. But no complaint of the character of the one now made was ever heard. This was not an evil to be provided for by any law, much less by a constitutional provision. These exceptions to the general rule were never considered violations of the rule itself. They grew out of the necessity of the case, and are founded in practical wisdom. The facts thus communicated go to the jury, not as entitled to the full faith of the facts sworn to by a witness from his own personal knowledge, but yet as competent to be considered by the jury in forming their verdict. But whether these exceptions be wise or unwise is not submitted to our judgment. They were well established at the time, and, we think, went into the constitution as part of the great principle of criminal evidence adopted by the clause now under consideration.'

"In Texas this question first came up in *Greenwood v. State*, 35 Tex. 588, decided by our supreme court in 1871. The charge in that case was an assault with intent to murder. One Hampton had testified on a former trial of the case, and before the second trial he died. The lower court, on the subsequent trial, permitted his testimony to be proved by one Lassiter, who heard the deceased witness give in his testimony at the first trial. This action of the court was assigned as error, and the question was thus presented. This case was tried before the adoption of our present constitution of 1876, but the clause of the bill of rights requiring the confrontation of the accused by the witnesses against him is contained in the same language in every constitution under which our people have lived, beginning with the constitution of the republic of Texas in 1836: See Declaration of Rights, art. 1, sec. 8; Const. 1845; Const. 1866, Bill of Rights, sec. 8; Const. 1869, Bill of Rights, sec. 8. The court, in said case in discussing the admissibility of the testimony, with reference to the article in our constitution requiring the defendant to be confronted with the witnesses against him, says, 'that the weight of authority, English and American, is in favor of the admissibility of the testimony,' and a number of well-considered cases are cited, and the court held the testimony admissible. *Black v. State*, 1 Tex. Crim. App. 369, was tried in the lower court at the August term, 1875, under the constitution of 1869; but the question was passed upon in the court of appeals after the adoption of the constitution of 1876. In that case the defendant was charged with murder. There had been a former trial, and Mrs. Butler, the wife of the deceased, had testified as to the dying declarations of her husband. She afterward died, and at a subsequent trial the lower court permitted a witness to testify before the jury, and reproduce the testimony of Mrs. Butler concerning the dying declarations of her husband. This action of the court was assigned as error, and the question in all its bearings was presented to our court of appeals. The inadmissibility of this testimony, in view of the provisions of our constitution, was ably and exhaustively presented by the appellant in that case. Judge Ector, in deciding the case, uses this language: 'We think, however, at this time it has generally been de-

clared to be the correct rule of law, both in England and in most of the American states, that the testimony of a deceased witness at a former trial of a criminal charge is admissible at a subsequent trial of the same case, and may be proved by another person who heard that testimony, and he can qualify himself to give it; that in this respect there is no difference between civil and criminal cases, and that the admission of such testimony is not against the provisions of Magna Charta, nor against the provisions of the bill of rights, of the first article, section 8, of the constitution of the state of Texas, wherein it is provided "that in all criminal prosecutions the accused shall be confronted with the witnesses against him." The current of authorities sustained the rulings of the court below in permitting Waters to give the testimony of the deceased witness at a former trial of this case.' And he cites a number of authorities, including the previous case of *Greenwood v. State*, 35 Tex. 588, and *Johnson v. State*, 1 Tex. Crim. App. 333. In *State v. Johnson*, 12 Nev. 121, the witness, Addington, testified against Johnson in the examining court; and his testimony was reduced to writing, and properly certified to. Said witness afterward died. Subsequently, the case was tried in the district court, and the examining trial testimony was introduced in evidence, over the defendant's objections. The point was saved, and the question presented to the court of appeals. Notwithstanding the decision in *Greenwood v. State*, 35 Tex. 588, the constitutional objections were again urged by appellant to this character of testimony. The court overruled the objection, and admitted the evidence. Our court of appeals, in passing on the question, say: "Testimony of the statements of a deceased witness given on a former trial between the same parties, touching the same subject matter, has been admitted among the exceptions to the rule excluding hearsay evidence from a very early period, and has been sanctioned by an unbroken current of decisions, both in England and in this country. . . . The constitutional objection to the admission of such testimony, "that the accused shall be confronted with the witnesses against him," has been frequently presented to the courts for adjudication, and is now no longer an open question. The leading case is *Commonwealth v. Richards*, 18 Pick. 434, 29 Am. Dec. 608, where it was decided that the competency of such evidence was not affected by the provisions in the bill of rights. The provision of the bill of rights of Massachusetts, upon which that decision was rendered, was substantially the same as that to be found in the present constitution of Texas (Tex. Const., art. 1, sec. 10) and the statutory requirements in *Paschal's Digest*, article 2490.' A number of authorities, both English and American, are cited, and the rule laid down in *Greenwood v. State*, 35 Tex. 588, is approved. These cases have been followed in Texas by an unbroken current of decisions, and the rule never questioned until the present case arose: See *Potts v. State*, 26 Tex. Crim. App. 663; *Childers v. State*, 30 Tex. Crim. App. 160; 28 Am. St. Rep. 899 (in this case the principle was recognized, but it was held that testimony taken in a habeas corpus trial was not examining trial evidence); *Varnell v. State*, decided in



1896, unreported: *McGee v. State*, 31 Tex. Crim. Rep. 72; *Bennett v. State*, 32 Tex. Crim. Rep. 216; *Meyers v. State*, 33 Tex. Crim. Rep. 204. In the above cases the predicate was the death of the witness. In the following cases the same principle was announced, but the predicate laid was absence of the witness from the state: *Sullivan v. State*, 6 Tex. Crim. App. 319; 32 Am. Rep. 580 (in this case the predicate was that the witness, after diligent search, could not be found in the state; this was subsequently overruled in *Evans v. State*, 12 Tex. Crim. App. 370); *Cooper v. State*, 7 Tex. Crim. App. 194; *Post v. State*, 10 Tex. Crim. App. 579; *Garcia v. State*, 12 Tex. Crim. App. 335; *Evans v. State*, 12 Tex. Crim. App. 370; *Cowell v. State*, 16 Tex. Crim. App. 57; *Kerry v. State*, 17 Tex. Crim. App. 178; 50 Am. Rep. 122; *Parker v. State*, 18 Tex. Crim. App. 72; *Steagald v. State*, 22 Tex. Crim. App. 464; *Conner v. State*, 23 Tex. Crim. App. 378; *Parker v. State*, 24 Tex. Crim. App. 61; *McCollum v. State*, 29 Tex. Crim. App. 162.

"From the vast number of decisions, English and American, on this subject, all one way—in England construing the question at common law, and in America construing the very letter of the bill of rights in regard to the reproduction of the testimony of a deceased witness, considered, discussed, and followed by an unbroken line of decisions in our own state—it would certainly seem that, if any question could be considered, settled, and fixed in the jurisprudence of a state, this should be. I apprehend no one will dare question at this day that when the amendment to the constitution of the United States on this subject was adopted, and when the states of the Union adopted that part of their constitutions requiring 'in all criminal prosecutions that the defendant be confronted by the witnesses against him,' it was done with reference to and having in view the rule on the subject in Great Britain. Nor will it be gainsaid that when our fathers in the republic of Texas, in 1836, ingrafted this provision in their bill of rights, and later, when our state came into the Union, under the constitution of 1845, with the provision inserted in the bill of rights that 'in all criminal prosecutions the accused shall be confronted by the witnesses against him,' this was copied from similar declarations in constitutions of other states of the American Union; and, in so adopting this provision, they considered what was the rule of construction, and what was the interpretation of similar language in the constitutions of other states. Those who formed our republic were, for the most part, from the older states, and it cannot be assumed that they were ignorant of the common law or of the laws and constitutions of the older states, and the same can be said of those who adopted the constitution of 1845. As early as 1835, when a provincial government for Texas was first organized, in the instrument of organization article 7 provides: 'All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England, and the penalties prescribed by said law in case of conviction shall be inflicted, unless the offense

shall be pardoned or fine remitted.' The constitution of the republic of Texas contains this provision: 'Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances and their judgment may require, and in all criminal cases the common law shall be the rule of decision': Tex. Const., art. 4, sec. 13. This was followed by the act of Congress on the 20th of January, 1840, enacting 'that the common law of England (so far as it is not inconsistent with the acts of Congress now in force) shall, together with such acts, be the rule of decision in this republic, and shall continue in full force until altered or repealed by Congress: Paschal's Digest, art. 978. When our code was adopted, in 1856, this additional provision on this subject became a part of the law, to wit: 'The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except where they are in conflict with the provisions of this code or some statute of this state.' Our constitution of 1845 was framed by men familiar with the principles of English common law. Many of them had attained eminence in their states before their removal to Texas, and were conversant with their systems of constitutions and laws. This is made manifest by the fact that all of the cardinal principles of our constitution are but copies from the older states. The provision in question, to wit: 'In all criminal prosecutions the accused shall be confronted by the witnesses against him,' etc., is an exact counterpart of that contained in the constitutions of a number of states, and is substantially similar to that of others; and to say that our constitution builders were seeking new guaranties for our citizens, not known in the older commonwealths, or were proposing a new experiment, it seems to me, would be attributing to them a degree of ignorance and audacity neither warranted by the work they did, or by the history of those times and traditions that have been handed down to us. Our constitution builders were lawyers, and they knew what they were doing, and when they said, 'The accused shall be confronted by the witnesses against him,' they knew how this question had been construed by the English courts, and they knew how it had been construed by the American courts under constitutional provisions similar to ours; and so, in all our constitutions from 1845 up to the present time, this provision has been carried forward in exactly similar language. And, moreover, our constitution builders, in 1876, and our people who approved their work, knew how this provision had stood in former constitutions, and knew how our own courts, in *Greenwood v. State*, 35 Tex. 588, and *Black v. State*, 1 Tex. Crim. App. 369, had construed a former similar provision; and it is a familiar rule of construction that when a statute is adopted from an English statute, or copied from a statute of another state, it is deemed to have been adopted together with the construction placed thereon by the courts of such state: See 23 Am. & Eng. Ency. of Law, 432, and authorities there cited. 'Where the words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and to have been adopted by the legisla-

ture as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute shall be construed according to the sense in which they have been so previously used, although that sense may vary from a strict literal meaning of the words. . . . In the interpretation of re-enacted statutes, the court will follow the constructions which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had, and, by re-enactment, to intend that they should have the same effect. So, statutes originally enacted in another state, when adopted, are deemed to be taken with the settled construction given them in the state from which they are copied': See Sutherland on Statutory Construction, secs. 255, 256, and authorities there cited. On this subject Judge Cooley says: 'Great Britain and the thirteen original states had each substantially the same system of common law originally, and a decision by one of the higher courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the states, though not necessarily to be accepted as binding authority, any more than the decisions in any one of the other states upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the Revolution is in the direct line of authority; and where a particular statute or clause of the constitution has been adopted in one state from the statutes of constitution of another, after a judicial construction had been given it in such last-mentioned state, it is but just to regard the construction as having been adopted as well as the words, and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case: Cooley's Constitutional Limitations, 64. "When a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new constitution, or into the constitution of another state, it must be presumed to have been adopted with the knowledge of that interpretation, and the courts will feel bound to adhere to it": See 3 Am. & Eng. Ency. of Law, 679, and authorities there cited.'

"These authorities not only show that our supreme court in *Greenwood v. State*, 35 Tex. 588, and in *Black v. State*, 1 Tex. Crim. App. 369, were required to adopt and follow the construction (as they did) placed on said provision of the bill of rights in regard to the confrontation of the accused by the witnesses against him, as placed thereon by the courts of the American states, but after the decisions in *Greenwood's* and *Black's* cases, which reingrafted the same interpretation that had been placed upon the bill of rights by other states—after the adoption of the constitution in 1876—our court of appeals was doubly bound to follow the interpretation placed upon this provision of the bill of rights, not only by the courts of other states, but by those of our own as well. This, as has been seen, was done in a great number of cases. So much for the construction of



section 10 of our bill of rights. But it is urged that the testimony offered in this case was examining trial evidence, and that such evidence is not a deposition; so that, even if our bill of rights authorized the reproduction of the testimony of a deceased witness, said statute relating to depositions does not cover examining trial evidence. Our statutes authorizing depositions in criminal cases are to be found in our Code of Criminal Procedure of 1895, from article 797 (formerly 757) to article 814 (formerly 774), inclusive, and also article 24 (formerly 25). Article 814 is as follows: 'The deposition of a witness taken before an examining court or a jury of inquest, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence, as is provided in the two preceding articles for the reading in evidence of depositions.' Article 24 is as follows: 'The defendant upon trial shall be confronted with the witnesses, except in certain cases provided for in this code, where depositions have been taken.' I might content myself with simply citing the decisions of this court in *Johnson v. State*, 1 Tex. Crim. App. 333, and *Kerry v. State*, 17 Tex. Crim. App. 178; 50 Am. Rep. 122. *Johnson's* case was decided in 1876, before the passage of article 814, which was passed in 1879. At the time of the decision there was in existence a statute passed in 1866: See 2 Paschal's Digest, art. 6605. Said statute was as follows: 'In all criminal prosecutions where the testimony of a witness has been reduced to writing, signed, and sworn to before an examining magistrate, or before any court, and the witness has died since giving his testimony, the testimony so taken down and reduced to writing may be read in evidence by such defendant as proof of the facts therein stated, upon any subsequent trial for the same offense; provided, however, that in all other respects testimony of such deceased witness shall be subject to the established rules of evidence in criminal cases. In every case death must be established to the satisfaction of the court.' It was contended in said case that the statutes only authorized the use of depositions by defendants, and excluded an appeal to the common law for the introduction of examining trial evidence on behalf of the state. The question was thoroughly discussed, and it was held that said statute did not even confer a new right upon the defendant, but merely placed in positive form a right which he already possessed, and left the rights of the state in the same condition as before its passage; and that the right to reproduce the testimony of a witness taken on an examining trial, and since deceased, was a right possessed by the state at common law; and the rules at common law, being authoritative in this state, when not in conflict with the provisions of the code, could be appealed to here: See Code Crim. Proc. 1895, art. 763. And the court, further discussing the statutes of Philip and Mary on the subject of examining trial evidence, substituted by 11 & 12 Victoria, quoting from Mr. Archibald, uses the following language: "Although the statutes relating to the examination of witnesses

against a prisoner before a justice of the peace previously in force contained no such express enactment as the above, it was yet determined in many cases, and recognized as a rule of law, that in all cases of examinations of witnesses in cases of felony, under these statutes, where they were taken in the presence of the accused, and he had the opportunity of cross-examining them, the deposition of any such witness might be read in evidence against the accused on his trial in case the person who made the deposition was dead': See, also, 1 Bishop's Criminal Procedure, sec. 1093. And Coleridge, judge, says: 'Before the enactment of 11 & 12 Victoria, chapter 42, I always understood the law was that, if a witness was absent by reason of death, the deposition was receivable in evidence against him': Citing *Regina v. Scaife*, 2 Den. C. C. 281-286; 17 Q. B. 238. The evidence in said case was held admissible. *Kerry v. State*, 17 Tex. Crim. App. 178, 50 Am. Rep. 122, was decided by this court in 1884, after the enactment of article 814, and construed said article to authorize the introduction of examining trial evidence, stating, however, that the legislature, in said article had used the word 'deposition' by mistake for the word 'testimony' or 'evidence.' In the latter observation, however, I do not concur, but believe it was the proper term. The word 'deposition,' in its broadest sense, is defined to be 'the evidence of a witness taken down in writing, and sworn to before an officer': See 5 Am. & Eng. Ency. of Law, 581. 'In procedure, "depositions," in the most general sense of the word, are the written statements, under oath, of a witness in a judicial proceeding. It is in this sense that the term is used when we say that, where a witness is dead, his depositions at a former trial are admissible in evidence on a subsequent trial between the same parties': See 1 Rapalje and Lawrence's Law Dictionary, 376, citing Powell on Evidence, 183. Mr. Roscoe, Mr. Wharton, and Mr. Phillips all treat examining trial evidence under the head of 'Depositions.' Examining trial evidence was called a 'deposition,' and it does not matter that depositions were unknown to the common law. If we get the name 'deposition' applied to examining trial evidence, then we have authority for our legislature to so term such testimony.

"I do not deem it necessary to enter into a discussion of article 814, in connection with the other articles of our Criminal Code of Procedure regarding depositions, in order to show that said article 814 was not intended merely to be supplementary to the statutes authorizing depositions for defendants, but is an independent statute, authorizing the use of depositions for the state. A reference to said article and to the other articles of the code, I believe, will clearly demonstrate this. Judge Hurt, in *Post v. State*, 10 Tex. Crim. App. 579, decided in 1881, stated the correct rule which would govern in cases where the evidence had been taken before an examining court, to wit: 'If the deposition is taken before an examining court or a jury of inquest, and is reduced to writing, and certified according to law, and the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the wit-

ness, and, since the deposition was taken, the witness has died, or has removed beyond the limits of this state, or has been prevented from attending the court through the act or agency of the defendant, or by the act or agency of any person whose object it was to deprive the defendant of the benefit of the testimony, or if, by reason of age or bodily infirmity, such witness cannot attend, the deposition is admissible. This rule has reference to depositions taken before examining courts.' In *Kerry v. State*, 17 Tex. Crim. App. 178, 50 Am. Rep. 122, the construction of this statute (Code Crim. Proc., art. 814), was settled in a clear and convincing opinion.

"I would further suggest, in this connection, that said article was enacted in 1878, was construed in 1881 and 1884, and, when it was re-enacted in 1895, came to us with a definite and fixed meaning and construction, and included in that construction examining trial evidence. Said article marks the only contingency in which the actual presence of the witness is dispensed with on the trial, and is based on article 25, which requires the accused to be confronted with the witnesses against him in all trials, except where depositions are authorized. This article is held in accord with the constitution, upon the theory that the constitution requires a confrontation of the witness with the accused in every criminal prosecution, and that this is satisfied when the witness, at any stage of the prosecution, has confronted the defendant, and been examined as a witness before a competent tribunal, and the defendant has had the privilege of a cross-examination. In all other cases there must be an actual confrontation of the accused by the witness; but, when he has once confronted the accused, what he shall testify is regulated by the rules of evidence. Both upon reason and authority, it occurs to me that examining trial evidence is a deposition, and that it is admissible on a subsequent trial of the defendant, where it is shown that the witness making the deposition has since died."

#### **Evidence of Absent Witness—When Admissible in Criminal Trial.**

It is everywhere conceded that the mere absence of a witness from a criminal trial who has testified at a preliminary examination or former trial of the same offense is not sufficient ground to admit such testimony in evidence, provided that the witness is within the jurisdiction of the court, and his absence has not been procured through the connivance of the accused. A showing that the witness, since giving his testimony at the preliminary examination, has removed to another parish or county, is not sufficient to justify the introduction of such testimony, and thus deprive the accused of his constitutional right to be confronted with the witnesses against him: *State v. Laque*, 41 La. Ann. 1070; *State v. Staples*, 47 N. H. 113; 90 Am. Dec. 565.

Evidence of the disappearance of an absent witness from the place at which she resided at the time she gave her testimony at the preliminary examination, and of declarations made by her before her disappearance, of an intention to go to another state with a



particular person, with whom she did not go, does not authorize the introduction of such testimony on the trial: *Harris v. State*, 73 Ala. 495. Mere proof that a witness did not respond to the summons of the court is not sufficient to admit his testimony taken at the preliminary examination of the case on trial: *State v. King*, 86 N. C. 603. Temporary illness of the witness, sufficient to prevent him from appearing in court, is insufficient ground for the admission of such testimony: *McLain v. Commonwealth*, 99 Pa. St. 86. The mere fact that a witness is out of the state does not constitute a predicate for the introduction of his testimony given at a previous judicial investigation of the case: *Sullivan v. State*, 6 Tex. App. 319; 32 Am. Rep. 580; *Menges v. State*, 21 Tex. App. 413. In some jurisdictions, the broad rule is maintained that, in criminal cases, testimony delivered in a previous judicial investigation or trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or the limits of the state, is not admissible. These cases hold that the removal of such witness from the state, and the consequent inability to procure his attendance, the accused doing nothing to prevent his attendance, do not, the witness being still alive, render such testimony admissible, as its admission would deprive the accused of the right to be confronted with the witnesses against him: *Pittman v. State*, 92 Ga. 480; *Owens v. State*, 63 Mass. 450; *Hall v. State*, 6 Baxt. 522; *Brogy v. Commonwealth*, 10 Gratt. 722; *People v. Newman*, 5 Hill, 295; *Collins v. Commonwealth*, 12 Bush, 271; *Bergen v. People*, 17 Ill. 426; 65 Am. Dec. 672; *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422. On the other hand, the great weight of authority establishes the rule that the testimony of a witness who was examined on the former trial of a criminal charge, or on the preliminary examination thereof, an opportunity to cross-examine being afforded to the accused, is admissible on the subsequent trial, on proof that the witness is absent from the state, either permanently, or for such an indefinite time that his return is merely contingent or conjectural: *Perry v. State*, 87 Ala. 30; *Pruitt v. State*, 92 Ala. 41; *Lucas v. State*, 96 Ala. 51; *Knight v. State*, 103 Ala. 48; *Burton v. State*, 107 Ala. 68; *Sullivan v. State*, 6 Tex. App. 319; 32 Am. Rep. 580; *Menges v. State*, 21 Tex. App. 413; *Johnson v. State*, 26 Tex. App. 631; *Crook v. State*, 27 Tex. App. 198. If a witness for the state in a criminal case has testified on the committing trial, but at the time of the main trial is in a foreign state and inaccessible, his previous testimony may be proved by one who heard it, and who professes to remember the substance of it as to the matter about which he testifies, and this may be shown by parol, although the testimony has been reduced to writing under the order of the committing court: *Smith v. State*, 72 Ga. 114; *Shackelford v. State*, 33 Ark. 539. In a criminal case, proof may be introduced of what a witness testified to on a former trial, if such witness has left the state: *People v. Devine*, 46 Cal. 46; or cannot be found, after due diligence has been exercised: *State v. Tyler*, 46 La. Ann. 1269; or, having been summoned, was taken sick on the way: *State v. Laque*, 41 La. Ann. 1070. The deposition of a

witness, taken at the preliminary examination, in the presence of the accused, is admissible on the trial, if such witness has left the state, or is out thereof, and his appearance cannot with diligence be procured at the trial: *People v. Nelson*, 85 Cal. 421; *State v. Riley*, 42 La. Ann. 995; *Hurley v. State*, 29 Ark. 17; *Shackelford v. State*, 33 Ark. 539; *Dolan v. State*, 40 Ark. 455; *Sneed v. State*, 47 Ark. 181. The reading of such deposition on the trial as secondary evidence does not violate the right of the accused to be confronted with the witnesses against him: *Hurley v. State*, 29 Ark. 17; *Sneed v. State*, 47 Ark. 180-186.

The constitution of California, article 1, section 13, provides that "the legislature shall have power to provide for the taking, in the presence of the accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." It has been repeatedly held that this provision is intended to refer only to cases of extrajudicial depositions taken *de bene esse*, and not to exclude, in criminal cases, including cases of homicide, the testimony of an absent witness designated as a deposition and judicially taken at the preliminary examination of the accused: *People v. Sierp*, 116 Cal. 249; *People v. Cady*, 117 Cal. 10; *People v. Chin Hane*, 108 Cal. 598; *People v. Oiler*, 66 Cal. 101.

Although the constitution guarantees that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, yet if they are absent by his procurement, or when enough has been proved to cast upon him the burden of showing, and he fails to show that he has not been instrumental in keeping them away, he is in no condition to assert that his constitutional right has been violated, when secondary evidence of the testimony which they gave on the preliminary examination or on a former trial of the same charge is offered against him, and such evidence is admissible: *Reynolds v. United States*, 98 U. S. 145; *State v. King*, 86 N. C. 603; *Williams v. State*, 19 Ga. 402; *Sullivan v. State*, 6 Tex. App. 319; 32 Am. Rep. 580.

*Deceased Witnesses.* — Whatever differences of opinion may have in former times existed, the rule is now too well settled to admit of or require any discussion that the testimony of a witness, since deceased, given under oath in a criminal proceeding authorized by law, where the accused had the opportunity of a cross-examination, is admissible against him in any subsequent trial of the same case. This rule admits the evidence of such witness, whether given at a preliminary examination or on a former trial of the same charge, and its admission does not violate the constitutional guaranty that the accused shall be confronted with the witnesses against him. In the case of *Mattox v. United States*, 156 U. S. 237-241, Mr. Justice Brown, speaking for the supreme court of the United States, after showing this to be the rule in England, said:

"As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible. In the

cases of *Finn v. Commonwealth*, 5 Rand. 701, *Mendum v. Commonwealth*, 6 Rand. 704, and *Brogy v. Commonwealth*, 10 Gratt. 722, the witnesses who had testified on the former trial were not dead, but were out of the state, and the testimony was held by the court of appeals of Virginia to be inadmissible, though the argument of the court indicated that the result would have been the same if they had been dead. In the case of *State v. Atkins*, 1 Over. 229, the former testimony of a witness since deceased was rejected by the supreme court of Tennessee, but this case was subsequently overruled in *Kendrick v. State*, 10 Humph. 479, and testimony of a deceased witness, taken before a committing magistrate, was held to be admissible: See, also, *Johnston v. State*, 2 Yerg. 58; *Bostwick v. State*, 3 Humph. 344. The rule in California was formerly against the admission of such testimony: *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Qurise*, 59 Cal. 343; but it is now admitted under a special provision of the code applicable to absent and deceased witnesses, which is held to be constitutional: *People v. Oiler*, 66 Cal. 101. In the case of *State v. Campbell*, 1 Rich. 124, the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and, of course, it was held inadmissible. Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming. The question was carefully considered in its constitutional aspect by the supreme judicial court of Massachusetts in *Commonwealth v. Richards*, 18 Pick. 434, 29 Am. Dec. 608, in which it was said that 'that provision was made to exclude any evidence by deposition, which could not be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law.' The subject was also treated at great length by Judge Drummond in *United States v. Macomb*, 5 McLean, 286; and the substance of a deceased witness' testimony given at the preliminary examination held to be admissible. All the cases up to that time were cited in the opinion, and the decision put upon the ground that the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read. From the following list of cases it will be seen that the same doctrine prevails in more than a dozen states: *Summons v. State*, 5 Ohio St. 325; *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. Rep. 740, in both of which cases the question was elaborately considered: *State v. McO'Blenis*, 24 Mo. 402; 60 Am. Dec. 435, a most learned discussion of the subject: *State v. Able*, 65 Mo. 357; *Owens v. State*, 63 Miss. 450; *Barnet v. People*, 54 Ill. 325; *United States v. White*, 5 Cranch C. C. 457; *Robinson v. State*, 68 Ga. 833; *State v. Wilson*, 24 Kan. 189; 36 Am. Rep. 257; *State v. Johnson*, 12 Nev. 121; *Roberts v. State*, 69 Ala. 515; *State v. Cook*, 23 La. Ann. 347; *Dunlap v. State*, 9 Tex. App. 179; 35 Am. Rep. 736; *O'Brian v. Commonwealth*, 6 Bush, 563;



*State v. Hooker*, 17 Vt. 658; *Crary v. Sprague*, 12 Wend. 41; 27 Am. Dec. 110; *United States v. Wood*, 3 Wash. C. C. 440; *State v. Valentine*, 7 Ired. 225. The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge of his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free simply because death has closed the mouth of that witness would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of citizens, but as securing to every individual such as he already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of the constitutional provision may occasionally be carried further than is necessary to the just protection of the accused and further than the safety of the public will warrant. . . . The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible, also hold that, not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased

ed witness, such as was produced in this case, is competent evidence of what he said": *Mattox v. United States*, 156 U. S. 244.

In the late case of *State v. Cushing*, 17 Wash. 544, it was held that the constitutional provision that the accused in a criminal prosecution shall have the right to meet the witnesses against him face to face does not exclude evidence of the testimony of a witness, since deceased, given upon the preliminary examination or a former trial of the same charge, when the accused has once had the advantage of seeing the witness and of subjecting him to cross-examination. In this case it was said: "Lastly, it is claimed that the court erred in admitting the testimony given on the former trial by a deceased witness, and it is argued with much earnestness on the part of counsel that the action of the court was an infringement of section 22 of article 1 of the constitution, which provides that in criminal prosecutions the accused shall have a right to meet the witnesses face to face. In support of their contention counsel cite the case of *Cline v. State*, 36 Tex. Crim. Rep. 320, ante, p. 850, wherein the majority of the court held, under a constitution providing that the accused had a right to be confronted by the witnesses, that testimony of a deceased witness given on a former hearing was inadmissible. No other case is cited by the appellant, and it seems that the overwhelming weight of authority is to the contrary": *State v. Cushing*, 17 Wash. 563. From among the multitude of cases sustaining this rule, that the testimony of a witness for the state, given on a preliminary examination or former trial of the accused, who was present and had a reasonable opportunity to cross-examine the witness, is competent against the defendant on his subsequent trial for the same charge, the witness having died since giving his testimony and before the subsequent trial, may be cited the following authorities, in addition to those already noticed: *Jackson v. State*, 81 Wis. 127; *State v. Byers*, 16 Mont. 565; *Sage v. State*, 127 Ind. 15; *State v. George*, 60 Minn. 503; *People v. Murphy*, 45 Cal. 137; *People v. Douglass*, 100 Cal. 1; *Commonwealth v. Cleary*, 148 Pa. St. 26; *Commonwealth v. Keck*, 148 Pa. St. 639; *Brown v. Commonwealth*, 73 Pa. St. 321; 13 Am. Rep. 740; *People v. Dowdigan*, 67 Mich. 95; *People v. Slight*, 48 Mich. 54; *State v. Staples*, 47 N. H. 113-119; 90 Am. Dec. 565; *Hall v. State*, 6 Baxt. 522; *Pope v. State*, 22 Ark. 372; *State v. King*, 86 N. C. 603; *Pittman v. State*, 92 Ga. 480; *Mitchell v. State*, 71 Ga. 128; *State v. Fitzgerald*, 63 Iowa, 268; *Collins v. Commonwealth*, 12 Bush, 271-273; *State v. De Witt*, 2 Hill, 282; 27 Am. Dec. 371; *Davis v. State*, 17 Ala. 354; *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422; *State v. McO'Blenis*, 24 Mo. 402; 69 Am. Dec. 435; *State v. Elliott*, 90 Mo. 350; *State v. Able*, 65 Mo. 357; *State v. Carlisle*, 57 Mo. 105; *Johnson v. State*, 1 Tex. App. 333; *Black v. State*, 1 Tex. App. 368; *Sullivan v. State*, 6 Tex. App. 319; 32 Am. Rep. 580; *Wade v. State*, 7 Baxt. 80.

As to the method of producing the evidence of the deceased witness, it may be stated that a transcript of the stenographer's notes of such testimony, supported by the oath of the stenographer as to

its correctness, is admissible against the accused on the subsequent trial: *State v. Byers*, 16 Mont. 565; *Sage v. State*, 127 Ind. 15. The testimony of the stenographer that, while he does not recollect the fact, yet he is of opinion that he took down all the questions put to such witness, and his answers thereto, and that he believes that his notes are substantially correct, is sufficient to authorize the admission of such notes of said testimony: *Jackson v. State*, 81 Wis. 127. The stenographer, while testifying to the testimony of the deceased witness given on the former hearing, may use his stenographic notes to refresh his memory: *State v. George*, 60 Minn. 503.

A statute providing that "whenever any person has been examined as a witness, either for the commonwealth or the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterward die, or be out of the jurisdiction so that he cannot be effectually served with a subpoena, or if he cannot be found, or if he become incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue," is not in conflict with a constitutional provision securing to the accused the right to meet the witnesses for and against him face to face: *Commonwealth v. Cleary*, 148 Pa. St. 26; affirmed in *Commonwealth v. Keck*, 148 Pa. St. 639. When the prosecuting witness in a criminal case has testified upon the preliminary examination, and has afterward died, his testimony may be produced upon the final trial by one who heard it, and is able to give the substance of it, and to allow such testimony to be thus reproduced is not in violation of the constitutional provision enumerated above: *State v. Fitzgerald*, 63 Iowa, 268; *Black v. State*, 1 Tex. App. 368. Such testimony may be proved by anyone who heard the witness testify, provided such person will on oath undertake to repeat in detail so much as the court may require: *Wade v. State*, 7 Baxt. 80. Upon the trial of an indictment, the written statement in a bill of exceptions of the testimony of a witness, since deceased, given on a former trial of the same case, is not admissible against the accused. The testimony of the deceased witness may be proved by a living witness, but not by a bill of exceptions: *Kean v. Commonwealth*, 10 Bush, 190; 19 Am. Rep. 63. On a second trial of a felony, the testimony given on the former trial by a witness who has since become insane may be read in evidence against the accused: *Marler v. State*, 67 Ala. 55; 42 Am. Rep. 95; *State v. King*, 86 N. C. 603.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WASHINGTON.**

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**STATE v. SUPERIOR COURT.**

[17 WASHINGTON, 12.]

**INJUNCTION TO PROTECT A DE FACTO OFFICER IN THE POSSESSION OF AN OFFICE.**—A court of equity has jurisdiction to protect a de facto officer in the possession of an office from intrusion by one claiming the office de jure. The court is not divested of its jurisdiction by allegations in the pleadings tending to put in issue the title to the office, if they are meant, and acted upon by the court, merely as explanatory of his de facto right to the possession of the office.

**OFFICE DE FACTO, WHO ENTITLED TO POSSESSION AS.**—One in possession of an office by virtue of a certificate of election issued by the proper officer and regular upon its face is entitled to retain possession and to perform the duties of the office without interference until such certificate is set aside by some appropriate proceeding.

**THE WRIT OF PROHIBITION** will not issue to prevent a court of equity from proceeding with a suit for an injunction to protect the complainant in his possession of an office of which he claims to be the incumbent de facto, where he does not seek, and the court does not propose, to try the title to the office, but only to inquire whether the complainant is an officer de facto, and, if so, to protect him in the possession of the office until his title thereto can be questioned by some appropriate proceeding by those who choose to assail it.

Metcalfe & Jurey and Frank W. Clarke, for the relators.

Cooley & Horan, for the respondent.

**12 REAVIS, J.** Plaintiff in the suit in the superior court and the defendant Fairbanks were each candidates for members of the council of the city of Everett at the municipal election on the 8th of December, 1896. The result was a tie vote between them.

Thereupon the city clerk, in pursuance of an ordinance under the charter of the city, decided the election by lot, and declared plaintiff the duly elected member of the council, and issued to him a certificate of election in due form. At the first meeting of the city council thereafter, on the 5th of January, 1897,<sup>13</sup> plaintiff and defendant each appeared in the councilroom, together with the other members of the council and the mayor. During this meeting the defendant Falconer was mayor. The defendant Fairbanks filed an affidavit to the effect that there was no fair lot cast by the clerk in determining the tie between plaintiff and defendant Fairbanks, and that the certificate of election held by plaintiff was fraudulent. The defendant Knapp then introduced the following resolution:

"Whereas satisfactory evidence has been produced to the council that no legal lot has been cast deciding the tie for councilman in the fourth ward, and no lot has been cast as provided by ordinance and resolution referring thereto; therefore, resolved, that the certificate of election as heretofore issued to W. J. Gillespie declaring him elected as councilman from the fourth ward of the city of Everett be and the same is hereby declared null and void, and the seat now held by said W. J. Gillespie under and by virtue of said alleged certificate of election be and the same is hereby declared vacant."

A vote was taken upon the resolution, the defendants Knapp, Kellogg, and Zimmerman voted in the affirmative, and the plaintiff and the three remaining councilmen voted in the negative. The mayor, Falconer, thereupon refused to recognize the vote of the plaintiff, and declared that the vote of the council was a tie, and he, in his capacity as mayor, then gave the casting vote and declared the resolution adopted. Thereupon a vacancy was declared to exist in the council by the same vote as that by which the resolution was adopted, and the mayor ordered that a ballot be taken for councilman to fill the alleged vacancy. The ballot was taken and Knapp, Kellogg, and Zimmerman cast their ballots for the defendant Fairbanks, which three votes were the only votes cast, and then the mayor declared Fairbanks elected to fill the vacancy, and thereafter and<sup>14</sup> ever since the three councilmen, Knapp, Kellogg, and Zimmerman, together with the mayor Falconer, refused to recognize the plaintiff as a member of the council; while the other three members of the council, together with the city clerk, recognized the plaintiff as the duly elected member of the council. The defendant Fairbanks persisted in

usurping the place of plaintiff as a member of the council and voting in plaintiff's place. Plaintiff Gillespie filed his bill in equity in the superior court praying that the several defendants, the mayor, Falconer, and members of the council, Knapp, Kellogg, and Zimmerman, be enjoined from recognizing Fairbanks as a member of the council, and further commanded to recognize plaintiff as a member of the council until a judicial determination of the controversy. The defendants objected to the jurisdiction of the superior court of the action on the ground that it was a proceeding to determine the title to an office and not cognizable in a suit in equity. The court overruled this objection and proceeded to try the cause, but before the decree was filed defendants moved here for a writ of prohibition against the superior court on the ground of want of jurisdiction in that court to try the cause and issue an injunction as prayed for in the complaint. An alternative writ was granted here, and, upon the return of the judge of the superior court, the facts as stated above are found.

At the trial of the cause in the superior court, and prior thereto, relators objected to the jurisdiction, but the judge distinctly stated in a written opinion that the title to the office of councilman could not be tried in the suit before him; that he only assumed to find which was the *de facto* councilman in possession of the office, and to protect such acting councilman from unlawful intrusion upon his office. At the trial, plaintiff's complaint was amended so as to state clearly that plaintiff was in possession under color <sup>15</sup> of right of the office, and the prayer of the complaint was that plaintiff be protected in such possession until a judicial determination could be had of the right to the office in a proper action, and the superior judge returns here his findings of fact, and the judgment that will be entered, if not prohibited by this court.

The judgment of the superior court was that the defendants and each of them be enjoined and restrained from any attempt to oust plaintiff from the office of councilman and from any attempt to seat the defendant Fairbanks, and from any interference with plaintiff in the exercise of his rights and privileges by virtue of his possession of the office, until the title to the office shall have been regularly adjudicated and determined in a proceeding conformable to law, and especially enjoining the defendant Fairbanks from any attempt to exercise the rights or perform the duties of councilman until such adjudication.

The single question for determination here is the jurisdiction of the superior court in a suit in equity to protect a *de facto* offi-



cer in the possession of his office from intrusion or molestation by one claiming the office de jure. It is true, in the complaint made by the plaintiff in the superior court, he sets forth such facts as would establish his superior right to the office, and claims such superior right. But the amendments which were made at the trial, by direction of the court, merely left the facts stated in the complaint as explanatory of his de facto right to possession of the office. It is maintained by the relators here that the title to the office of councilman was directly put in issue by the pleadings, and that the superior court was thus divested of jurisdiction to hear the cause further. Relators assume that the case of *Mullen v. Tacoma*, 16 <sup>16</sup> Wash. 82, sustains their position. In that case the court said: "The real object sought to be accomplished was to contest the right to the office. . . . This being so, it came within the general rule governing contests over the right to hold an office. It would be against public policy to allow the functions of the government to be arrested by injunction in aid of such a contest."

The facts were not similar to those in the case at bar. Counsel for relators cite many authorities to support the proposition that a court of equity has no jurisdiction to interfere in election contests and election matters by injunction, and has no jurisdiction to interfere in municipal elections and political matters. The soundness of these general statements of the law cannot be questioned, and the authorities cited fully sustain them. But *High on Injunctions*, section 1315, states what we conceive to be the generally accepted rule: "While, as is thus shown, courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto, by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. . . . And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established." The text of *High* is well supported: *Brady v. Sweetland*, 13 Kan. 41; *Braid v. Theritt*, 17 Kan. 468; *Guillotte v. Poincy*, 41 La. Ann. 333; *Palmer v. Foley*, 45 How. Pr. 110; *Appeal of Town Council (Pa., Oct. 29, 1888)*, 15 Atl. Rep. 730; *Beach on Injunctions*, sec. 1380.

One in possession of an office by virtue of a certificate of election issued by the proper officer and regular upon <sup>17</sup> its face is entitled to retain possession and perform the duties of the office without interference until such certificate is set aside in some appropriate procedure. The clerk who issued the certificate to plaintiff appears to have been the proper officer to make the certificate for the councilman. The plaintiff was in the council with this certificate, and was thus *prima facie* a member of the council, having taken the oath of office and duly qualified to exercise its duties: *People v. Miller*, 16 Mich. 56; *Kerr v. Trego*, 47 Pa. St. 292; *People v. Head*, 25 Ill. 325; 2 *Dillon on Municipal Corporations*, 3d ed, sec. 892. See, also, *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176.

But we are rather inclined to conclude that it is not material here to inquire further into the return of the judge of the superior court than the bill of complaint and the conclusions of that court. These show that the plaintiff did not seek, and the court did not propose, to try the title to the office of councilman, but that court only determined to protect the possession of a *de facto* member of the council in his possession, and we are inclined to hold that the superior court, having jurisdiction to protect by injunction an officer in possession under color of right, must first find the facts which constitute such color of right and possession, and that such conclusions of fact by the superior court can only be reviewed on appeal to this court.

Having found jurisdiction of the cause in the superior court, the writ of prohibition is denied.

Scott, C. J., and Anders and Gordon, JJ., concur.

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**OFFICERS DE FACTO—WHO ARE.**—*De facto* officers are those who are in possession of an office and discharging their duty under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer: *State v. Oates*, 86 Wis. 634; 39 Am. St. Rep. 912, and note; *Weatherford v. State*, 31 Tex. Crim. Rep. 530; 37 Am. St. Rep. 828, and note; *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658; 32 Am. St. Rep. 228, and note.

**PROHIBITION—WRIT OF—WHEN GRANTED.**—A writ of prohibition should not be granted except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief: *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478, and note. It does not lie to test the title of a *de facto* judicial officer: *In re Radl*, 86 Wis. 645; 39 Am. St. Rep. 918. One party to a contest for an office cannot by prohibition restrain his competitor, who is the *de facto* officer, from performing the

duties of office: Monographic note to State v. Commissioners, 12 Am. Dec. 607; Walcott v. Wells, 21 Nev. 47; 37 Am. St. Rep. 478, and note.

**INJUNCTION—OFFICERS—TITLE TO OFFICE.**—An injunction does not lie to restrain an officer de facto from performing the duties of his office on the ground that by accepting a subsequent office he has vacated the first: Hagner v. Heyberger, 7 Watts & S. 104; 42 Am. Dec. 220; Sherman v. Clark, 4 Nev. 138; 97 Am. Dec. 516, and note. See Delehanty v. Warner, 75 Ill. 185; 20 Am. Rep. 237.

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## ARMSTRONG v. MAYBEE.

[17 WASHINGTON, 24.]

**LANDLORD AND TENANT—LIABILITY FOR REPAIRS—PROPERTY DESTROYED BY FIRE.**—A covenant by a lessee that he will maintain all the machinery and buildings on the leased premises "in as good condition and repair as the same now are in, and return the same to the lessor at the expiration of such lease in as good condition as the same now are in, reasonable wear and tear excepted," imposes on him the obligation to repair the buildings in the event of their destruction by fire during the continuance of the lease, though without his negligence or other fault.

Richard Winsor and George R. Morris, for the appellants.

Hart & Hart and William Parmerlee, for the respondent.

**25 REAVIS, J.** Respondent brought action for breach of covenant in a lease of a shingle-mill and machinery. Respondent leased to appellants a shingle-mill, mill grounds, mill machinery, dryhouse, office, and office fixtures, for a term beginning the 13th of October, 1894, and ending the first day of January, 1896, unless the lease should be terminated by a sale of the property by the lessor. After stipulations for the payment of rent, the following covenants were stated: "The lessee shall maintain all of the machinery and buildings of said mill in as good condition and repair as the same now are in, and return the same to the lessor at the expiration of said lease in as good condition as the same are now in, reasonable wear and tear excepted. . . . That he (lessee) will maintain all the said mill, machinery, and buildings in as good condition and repair as the same are now in, and return the same to lessor at the expiration or termination of this lease in as good condition as the same are now in, reasonable wear and tear from ordinary use alone excepted."

There was a further stipulation that the lessee should, during the continuance of the term, maintain and keep employed and on duty at and about the mill a day watchman, and a night watch-



man, whether the mill was operated or not. In March, 1895, the mill was entirely destroyed by fire. Respondent alleged in his complaint that this fire was because of appellants' negligence. This was denied in the answer, but no question is raised here upon this point. The court instructed the jury as follows: "The courts instructs you that the lease introduced in evidence and set out in the plaintiff's complaint between <sup>26</sup> these parties imposes an obligation upon the defendant to rebuild the buildings and the mill in case it should be burned during the tenancy. In other words, he was under the obligation to return that mill to him in as good condition as it was at the time he received it, reasonable wear and tear excepted."

Appellants contend that the instruction was wrong, and counsel have, with much industry and learning, cited many authorities in support of appellants' claim that the language written in the lease does not constitute a covenant to rebuild in case of fire by accident and without fault of the lessee. Without reviewing in full the cases presented in the respective briefs of counsel here, but stating our conclusion from an examination of them, we are of opinion that, without an express covenant to rebuild, the lessee is under no obligation to do so. We understand this to have been the settled law since the time of Edward IV, first in England, and followed in this country. But either lessor or lessee may make any agreement which is lawful relative to repairs during the term, or to rebuild in the event of the destruction of the buildings, and when such covenant is made it must be enforced. In the lease under consideration the terms used constitute an express covenant to repair. Taylor on Landlord and Tenant, eighth edition, section 364, states the rule which is approved by the great weight of authority: "Under an express covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises are entirely consumed, he is still bound to repair within a reasonable time. And the principle applies to all damages occasioned by a public enemy, or by a mob, flood, or tempest. Thus, where the covenant is to repair in general terms, or to repair, uphold, and support, or however otherwise phrased, <sup>27</sup> if it undertakes the duty of repair, it binds the lessee to rebuild if the premises are destroyed. For this reason, and in order to afford some protection to the tenant, it is customary to introduce into the covenant to repair an exception against accidents by fire, tempest, or lightning."

Wood on Landlord and Tenant, second edition, section 370, declares: "If a lessee covenants to repair and keep the premises in repair during the term, not excepting damage by fire or the elements, he is bound to rebuild them if burnt down by accident, negligence, or otherwise. It is of no importance how the covenant is worded; unless it is qualified, the lessee is bound to rebuild in case the buildings are destroyed by fire or other casualty during the term; the tenant, if the burden of the covenant rests upon him, or the landlord, if he is the covenantor, must rebuild. Thus, a covenant 'to repair, uphold, and support,' or to 'well and sufficiently repair,' or to keep in repair and leave as found, or to 'repair and keep in repair,' to keep in 'good repair, natural wear and tear excepted,' to make 'all necessary repairs,' to deliver up 'in tenantable repair,' or to 'deliver up the premises in as good a condition as they now are,' all impose upon the covenantor the duty of rebuilding or restoring premises destroyed or injured by the elements."

The case of *Warner v. Hitchins*, 5 Barb. 666, cited by appellants, was upon the following clause in a lease: "And also at the expiration of the lease to surrender up the possession of the said premises in the same condition the same now are, natural wear and tear excepted." The lease contained no other express stipulations on the part of the defendants. The court in that case held that this clause did not constitute an express stipulation to repair.

And thus, in the case of *McIntosh v. Lown*, 49 Barb. 550, cited by appellants, the court said:

<sup>28</sup> "The defendants' covenant in the lease, 'to keep the buildings and fences in good repair, except natural wear and tear,' bound them to rebuild in case of accidental destruction by fire or otherwise."

And the lessee was there held liable in damages for the value of a barn destroyed, which he did not rebuild. In this case the court restates the views held in *Warner v. Hitchins*, 5 Barb. 666, as follows: "Some authorities hold that where the covenant by the lessee is to repair and leave the premises in the same state as he found or received them, or language to that effect, he is merely required to use his best endeavors to keep them in the same tenantable repair, and is not bound, by such a covenant, to restore buildings destroyed, by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant, that the lessee is so to repair or keep in repair the

buildings, etc., as to leave the demised premises in the same state as he received them; and such I think is the settled law. But where the covenant is to repair, or keep in repair generally, the buildings, etc., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, etc., in case of the accidental destruction of the buildings, etc.”

The case of *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, was upon a lease containing the exception of “damages by the elements” in the covenant to repair, and it was held by Judge Cooley that destruction of a building by accidental fire was included within the exception. We agree with the rule of construction stated by Judge Sherwood in the concurring opinion in that case, that: “In construing the covenants contained in a lease the cardinal rule is that the intention of the parties shall govern; and the courts will not extend or enlarge the obligation of the lessee beyond the plain meaning of the language used and the intention existing at the time it was made;”<sup>29</sup> and if there is not an express stipulation to the effect to restore buildings and other property leased, destroyed by casualties from fire or water, without fault or neglect on the part of the tenant, the loss must fall upon the landlord or reversioner.”

But in the case at bar we are unable, from any fair reading of the whole lease, to find any doubtful language or anything in the circumstances of the parties which would require other than one construction of the language used. They chose to use language and terms which have had a received meaning in the courts for generations, and though the phraseology may slightly differ from that of contracts under consideration in some of the adjudicated cases, we cannot see any distinction in the meaning. We are not able to find any qualification of the general covenant to repair in this lease. The contract is one before the court for construction and enforcement as the lessor and lessee have made it. Our conclusion is, that it imposed on the lessee the obligation to rebuild the mill, which was destroyed by fire.

The judgment of the superior court is affirmed.

Anders and Gordon, JJ., concur.

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LANDLORD AND TENANT—COVENANT TO REPAIR—DESTRUCTION OF PREMISES BY FIRE.—If a lease provides that the leased property shall be returned “in as good condition as it now is, usual wear excepted,” the tenant is not liable in damages if the property is, during the term of the lease, destroyed by fire without fault on his part: *Seever v. Gabel*, 94 Iowa, 75; 58 Am. St. Rep. 381, and note. See *Wattles v. South Omaha etc. Co.*, 50 Neb. 251; ante, p. 554, and monographic note thereto.



## WOONSOCKET RUBBER COMPANY v. LOEWENBERG.

[17 WASHINGTON, 29.]

**BONA FIDE PURCHASER—PRE-EXISTING INDEBTEDNESS.**—An assignment of goods obtained by the vendor by fraud, where the consideration of such assignment is the payment of a pre-existing indebtedness, does not constitute the assignee a bona fide purchaser for value. Hence such goods may be recovered from him by a person from whom they were procured by fraud.

**SALE PROCURED BY FRAUD—RIGHT OF RESCISSION.** One who is induced by fraud to sell his property on credit may disaffirm the sale and recover the property from the fraudulent vendee or from a vendee of the latter who has not made any other payment therefor than the surrender of pre-existing indebtedness.

**FRAUD IN SALE, QUESTION OF, WHEN FOR THE JURY.**—If the plaintiff claims that he was induced to make a sale on credit on the representation of the defendants that they were perfectly solvent, that their real property was worth twice as much as their debts, and that they directed his attention to statements made by them to a mercantile agency, which were false, but the defendants testify that they made no statements to the plaintiff respecting their solvency, and that the statements made to the mercantile agency were not made to obtain credit, but to avoid black-mailing, the question whether the sale was induced by fraudulent representations should be submitted to the jury.

**FRAUDULENT SALE, RATIFICATION OF, WHAT IS NOT.**—The endeavor of a vendor to obtain security for goods sold by him does not preclude him from rescinding the sale for fraud, if, at the time of such endeavor, he was not aware of the facts entitling him to rescind.

Samuel R. Stern, for the appellant.

L. B. Nash, Lucius G. Nash, Dolph, Mallory & Simon, and John M. Gearin, for respondents.

**30 ANDERS, J.** This was an action to recover certain rubber goods which the plaintiff alleged it was induced to sell to defendants Loewenberg by fraudulent representations made by them, as to their financial condition, at the time the contract of sale was consummated. It appears that the goods in controversy were ordered by the firm of Loewenberg Brothers, who were merchants at Spokane, some time in May, 1894, and were received by them during the following month, and were to be paid for within sixty <sup>31</sup> or ninety days after the first day of October. Nothing was ever paid on account of the goods, and a portion of them was sold by Loewenberg Brothers in the ordinary course of business, and the remainder was transferred by them by bill of sale to defendant Glover, as trustee, for the purpose of paying certain debts of the firm which were contracted long before these goods were purchased. This bill of sale, together with a deed which was exe-

cut at the same time, purported to convey to the trustee all of the property, real and personal, both of the firm and of B. and H. Loewenberg, the individual members thereof. These instruments were executed on January 2, 1895, and Mr. Glover, the trustee therein mentioned, immediately took possession of all the merchandise in the store of Loewenberg Brothers, including the property in question. The plaintiff thereafter, but on the same day, commenced this action in which it sought to rescind the sale to Loewenberg Brothers, on the ground above indicated, and to obtain possession of the goods. The cause proceeded to trial, and, after the plaintiff had introduced its evidence, a nonsuit was entered in favor of Loewenberg Brothers, on the ground, it seems, that the action could not be maintained against them, as they were not in possession of the goods and claimed no title thereto.

It appeared on the trial that the debts to be paid by the trustee were all evidenced by promissory notes which were past due at the time of the transfer, and that one Julius Loewenberg was liable on one of them at least, as maker, and on others as indorser. At the close of the evidence, the court directed the jury to return a verdict for the defendant Glover, on the ground, as then stated, that Julius Loewenberg was an indorser on all of the notes. We presume, from this statement, that the trial judge was of the opinion that the creditors for whose benefit the property <sup>32</sup> was conveyed to Mr. Glover, by relinquishing and surrendering to him these notes, thereby became bona fide purchasers for value, and that their trustee was entitled to retain the goods as against the original owner; and it is conceded by the counsel for plaintiff and appellant that, if these preferred creditors were bona fide purchasers for value, they were entitled to retain the property in dispute in this action, even though the same may have been obtained from appellant by fraudulent representations on the part of Loewenberg Brothers. He contends, however, that they are not bona fide purchasers; that the claim of one of the alleged creditors, at least, which was directed to be paid, was invalid, and that, even if all the claims for which the property of the firm was transferred were just and valid, appellant is nevertheless entitled to recover, for the reason that a sale, or assignment, of goods obtained by fraud, without other consideration than the payment of a pre-existing debt, does not constitute such vendee or assignee a bona fide purchaser for value, in contemplation of law.

If this last proposition announces the correct doctrine, the judgment must be reversed, if the goods were obtained by the means alleged, for, in our opinion, the consideration for the conveyance was nothing more nor less than the payment of antecedent debts. Nothing whatever was paid at the time of the transfer. No new liability was incurred, and no worse position was assumed, by either of these creditors. One note of the firm for thirty-one thousand one hundred and seventy-five dollars and sixty-eight cents which constituted the claim of the London & San Francisco Bank, and which was delivered to the trustee of the creditors, was originally given to Julius Loewenberg, a member of a former firm of Loewenberg Brothers, and was indorsed by him to the bank as collateral security for his individual indebtedness, and, therefore, the bank, by surrendering <sup>33</sup> the note, was deprived of no right as against him. In fact, all the claims for which the property was transferred were treated by the parties to the transaction as mere debts of Loewenberg Brothers, and the fact that such debts were evidenced by notes we conceive to be wholly immaterial.

The vital question then is, Are these preferred creditors, through their representative Glover, entitled to hold the property in question, as bona fide purchasers or assignees, as against appellant, assuming that the goods were procured by fraud by Loewenberg Brothers? While there is some conflict in the decisions on this question, the great weight of authority seems to be in favor of a negative answer. It is well settled that one who has been induced by fraud to part with his property may disaffirm the sale and reclaim the property from the fraudulent vendee. He may lose this right, however, by treating the purchaser as the owner of the property so obtained, after discovering the fraud, and will lose it absolutely if, during the time intervening between the delivery of the goods and the attempted rescission, the goods have been sold to an innocent purchaser for a valuable consideration, or, in other words, to a bona fide purchaser for value.

It was well said by Allen, Judge, in *Barnard v. Campbell*, 58 N. Y. 76, 17 Am. Rep. 208, that: "The superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact that, acting upon the evidence of title which the owner has permitted the wrongdoer to assume and possess,



he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership if he is compelled to surrender the property. The mere possession by the party claiming to hold will <sup>34</sup> not sustain his claim, but the circumstances under, and consideration upon, which he has acquired the possession are also material. Were it otherwise, an assignee for the benefit of creditors, or one who should take as collateral security for the payment of a precedent debt, would hold as against the original owner, which is not claimed and is contrary to the whole current of authority. Several things must concur to bar the claim of the defrauded vendor: 1. He must have parted with possession of his property with intent to pass the title to the wrongdoer, thus giving him the apparent right of disposal. If property is taken feloniously, or without the consent of the owner, the taker can make no title to it, even to an innocent purchaser with value. 2. A third party must have acquired title from the wrongdoer without notice of the defects in his title or knowledge of circumstances to put him to an inquiry as to the source of his title. And 3. Such third party must have parted with value upon the faith of the apparent title of the wrongdoer, and his right to dispose of the property. If any of these elements are wanting the vendor seasonably pursuing his legal right may have his property."

This quotation clearly sets forth the principle and the reasons upon which the decisions of the courts are generally based, and it seems to us that what is there said is peculiarly applicable to this case. Considered either as purchasers or assignees, these creditors neither parted with value nor incurred obligations upon the faith of the apparent title of Loewenberg Brothers, and their rights are, therefore, inferior to that of appellant. While we do not decide that a pre-existing debt would not, in any case, constitute a good and sufficient consideration for the transfer of property, we do hold that if appellant was, in fact, induced to sell these goods by fraudulent representations, as alleged, it has a right to reclaim them from the respondents.

In *Scott v. McGraw*, 3 Wash. 675, this court held that a vendor of goods sold upon credit might rescind the sale for fraud on the part of the vendee and <sup>35</sup> recover the goods from a sheriff holding them under a writ of execution, for the reason that the sheriff was not a bona fide purchaser; and we think that a mere trustee for creditors occupies no better position than a sheriff who holds possession by virtue of an execution. That the creditors of

Loewenberg Brothers are not entitled to the rights of bona fide purchasers will be seen by reference to the following authorities: Cobbey on Replevin, sec. 286; Benjamin on Sales, Bennett's ed., 447; Farwell v. Hanchett, 120 Ill. 573; Barnard v. Campbell, 58 N. Y. 76; 17 Am. Rep. 208; Coddington v. Bay, 20 Johns. 637; 11 Am. Dec. 342; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Work v. Jacobs, 35 Neb. 772; Overstreet v. Manning, 67 Tex. 657; Henderson v. Gibbs, 39 Kan. 679; Farley v. Lincoln, 51 N. H. 577; 12 Am. Rep. 182; Sleeper v. Davis, 64 N. H. 59; 10 Am. St. Rep. 377; Eaton v. Davidson, 46 Ohio St. 355.

In 21 American and English Encyclopedia of Law, page 575, many other cases are collected, and a few cases are also referred to as holding a contrary doctrine.

Thus far, it will be remembered, we have assumed that the goods in controversy were obtained from appellant by Loewenberg Brothers upon fraudulent representations. But, as a matter of fact, that question has never been properly determined. There was such a marked conflict in the evidence bearing on that subject that it should have been submitted to the jury. The agent of appellant testified, in substance, that at the time he was negotiating the sale to Loewenberg Brothers they stated to him that they were perfectly solvent; that their real estate alone was worth double the amount of their debts, and that they had made a statement, in writing, of their assets and liabilities to a certain mercantile agency, which statement showed their <sup>36</sup> financial condition, and to which they directed his attention, and that he examined this statement before forwarding the order for the goods to appellant, and that the goods were shipped on the faith of these representations. It was clearly shown on the trial that Loewenberg Brothers were at that time hopelessly insolvent, and that they owed over one hundred thousand dollars more than the indebtedness shown by their statement to the mercantile agency. B. Loewenberg testified that no statements were made to appellant's agent as to the financial condition of the firm of Loewenberg Brothers. He admitted, however, that he made the statement to the mercantile agency, which appellant claims to have relied on, and that it was not true. But he averred that it was not made to obtain credit, but to avoid being blackmailed. Upon this evidence, the question whether the goods were or were not obtained by fraudulent representations was one of fact for the determination of the jury.

Appellant complains of the action of the court in dismissing the case as against Loewenberg Brothers, and, inasmuch as it had

the right to recover from them, in case of a recovery against respondent Glover, the value of the goods not turned over to the latter, we think the motion for a nonsuit should not have been granted, although we would not be disposed to reverse the judgment upon that ground alone.

We are also of the opinion that the trial court should have allowed counsel for appellant greater latitude in the examination of respondents Loewenberg on the issue of fraud. But we will not extend this opinion by pointing out specifically the particular questions to which objections were made and sustained.

It is claimed on behalf of the respondents that appellant, after becoming fully aware of the financial embarrassment of Loewenberg Brothers, endeavored to get this claim <sup>37</sup> secured, and could not thereafter elect to rescind the sale. It is true that appellant's agent offered to pay off a mortgage on certain real estate of Loewenberg Brothers, if they would give appellant a second mortgage for the amount so paid, together with the amount due it. But it appears that he was not aware of the fact that their financial condition was entirely different from what he supposed it was when he sold them these goods, and that he had no knowledge of the particular debts to pay which they surrendered up and transferred the whole of their property; and, if that is so, it cannot be said that what he did amounted to a ratification of the sale, or operated as a bar to a rescission.

The judgment is reversed and the cause remanded for a new trial.

Scott, C. J., and Gordon, J., concur.

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**SALES—RESCISSION BY SELLER FOR FRAUD OF BUYER.**—Representations of his solvency made by a buyer as a basis of credit, and known by him to be willfully false, and but for which the sale would not have been made, are fraudulent, and entitle the seller to rescind the sale, and to reclaim the goods so obtained, unless they have passed into the hands of an innocent purchaser: *Extended note to Reid v. Cowduroy*, 18 Am. St. Rep. 362; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48; 19 Am. St. Rep. 738, and note; *Nichols v. Michael*, 23 N. Y. 264; 80 Am. Dec. 259, and note.

**SALES — RESCISSION — RECOVERY OF PROPERTY IN HANDS OF THIRD PERSONS—WHO ARE BONA FIDE PURCHASERS.**—The rescission of a fraudulent sale by the vendor must be made before other rights acquired in good faith have intervened: *Union etc. Co. v. Mallory etc. Co.*, 157 Ill. 554; 48 Am. St. Rep. 341. This exception, however, does not embrace one who takes a pledge or mortgage of personal property as security for a pre-existing debt: *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228; 53 Am. St. Rep. 527; or attachment creditors of the buyer: *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48; 19 Am. St. Rep. 738; *Buffington v. Gerrish*, 15 Mass. 156; 8 Am. Dec. 97. See *Bidault v. Wales*, 20 Mo. 546; 64



Am. Dec. 205, and note; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118. In opposition to the principal case, it is held in *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401, that a creditor who accepts goods in payment of a pre-existing debt is a purchaser for a valuable consideration within the meaning of the rule that a bona fide purchaser of personal property for value without notice, from a vendee who obtained it by means of fraudulent representations, takes good title as against the original vendor.

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## RAYMOND v. JOHNSON.

[17 WASHINGTON, 282.]

**STATUTE OF FRAUDS.—AN AGREEMENT TO PROSPECT FOR AND LOCATE MINES ON JOINT ACCOUNT, or as mining partners, is not within the statute of frauds. Hence, one who, while prospecting under such an agreement, discovers and locates a valuable mine may be compelled to convey a moiety thereof to his partner, or to account for the latter's share of the proceeds of any sale made thereof.**

**PRACTICE AND PLEADING.—A denial of knowledge sufficient to form a belief as to certain allegations in the complaint should be disregarded when the defendant is presumed to have knowledge thereof, as where the allegation is that he made an agreement with the plaintiff.**

Cyrus Happy, for the appellant.

William T. Stoll and R. E. Porterfield, for the respondent.

<sup>232</sup> REAVIS, J. Respondent brought suit to have appellant Johnson declared respondent's trustee for an undivided one-fourth interest in the Keystone Quartz Mining Claim, located in Flathead county, Montana; and to have the defendant Finch pay to respondent part of the bonded price of five-sixteenths of the claim, which is claimed to be proportionate to respondent's interest, instead of paying the same to appellant Johnson, through the defendant bank, as required by a bond held by Finch from Johnson; and, in default of Finch's paying the price mentioned in the bond, that then appellant Johnson be required to convey to the respondent an undivided one-fourth interest in the claim; and that the defendant, the Exchange National <sup>233</sup> Bank, be enjoined from delivering to the defendant Finch, or any other person, a deed in its custody, made by appellant Johnson, to an interest in the claim, and that appellant Johnson be enjoined from assigning any interest thereafter in the mining claim.

The fourth allegation of the complaint is as follows: "That in the summer of the year 1895 the said plaintiff and the said defendant S. W. Johnson entered into a mining partnership by

which they mutually agreed with each other that they would each diligently prospect for and locate and develop mines, mining claims, water rights, and millsites in the states of Idaho and Montana on the public lands of the United States, and, upon discovering or acquiring the same or any such, that they would locate and hold and work the same in the joint names of and for the joint use and benefit of the plaintiff and defendant, Johnson, and that they should own in equal shares any and all mineral claims, mines, water rights and millsites so discovered or in any manner acquired by either of them."

Respondent alleges that he has duly performed all the conditions of the agreement on his part, and that he diligently prospected, as required by the agreement, in behalf of Johnson and himself; that while respondent and Johnson were prospecting, in pursuance of the agreement, they discovered some float or particles of ore which they thought came from a ledge of ore further up the mountain or hill upon which they were working, and Johnson requested respondent to follow up and trace the float and prospect for a supposed ledge from which the float was thought to have come, and that he, Johnson, would go over on the other side of the mountain and search there, under the agreement, for mines and claims, and that while respondent was prospecting on the float, for the equal benefit of himself and Johnson, the latter went over the mountain or hill and continued to work, and there, with one Whitcomb, whom he chanced to meet, Johnson discovered a great and <sup>234</sup>valuable lode of free milling gold ore on the unsurveyed and unclaimed public lands of the United States, and that Johnson, in violation of his agreement with respondent, and for the purpose of cheating and defrauding him, located the claim under the general mining laws of the United States in the names of Johnson and Whitcomb, excluding the respondent from all interest therein, and ever since has so fraudulently and dishonestly excluded respondent therefrom; that thereafter Johnson sold to defendant Gorham, by deed, an undivided one-sixteenth interest, and to one Watson an undivided two-sixteenths, and thereafter bonded to the defendant Finch, who was representing as trustee unknown parties, by a sufficient bond, an undivided five-sixteenths interest for the sum of three thousand nine hundred and six dollars and twenty-five cents, one hundred dollars of which was paid; that the deeds and the bond were duly recorded in Flathead county; that they were executed for the purpose of defrauding respondent out of his in-

terest in the mining claim; that all the transfers and the bond were made without the knowledge or consent of respondent; that the mining claim is reasonably worth twenty thousand dollars; that after the deeds and bond were executed, Johnson executed a deed sufficient in form to the interest described in the bond in favor of Finch, trustee, and deposited the deed with the defendant bank at Spokane, Washington, to be delivered to Finch, trustee, when the purchase price mentioned was paid to the bank; that the bank received and now holds the deed, and has agreed to deliver it to Finch upon the payment of the money for the use and benefit of Johnson; that Finch has the money in his possession and is about to pay the same to the bank; that Johnson is insolvent; that Whitcomb was a locator in good faith and is the owner of an undivided one-half interest in the claim, and that he had at the time no notice of the relation existing between respondent and Johnson; <sup>235</sup> that defendant Gorham claims an interest in the mining claim in addition to the one-sixteenth interest conveyed by deed, and Gorham also claims an interest in the moneys due on the bond on the five-sixteenths interest, but that Gorham's claim is inferior to that of respondent to the money and to respondent's interest in the mining claim; that after Johnson made the location as before mentioned, he denied respondent's right to share in the claim, and respondent's right to share in the purchase price of the claim that is now due. Defendant denied having sufficient information to form a belief as to the matters stated in the fourth allegation of the complaint, and denied that the defendant Gorham claims an interest in addition to the one-sixteenth interest in the mining claim, or that Gorham claims an interest in the moneys due, mentioned in the bond to Finch; denies his insolvency; denies that the deed and bond were given to defraud respondent; admits the discovery and location of the mining claim by himself and Whitcomb; admits the bonding of the five-sixteenths interest in the claim to Finch, as alleged in the complaint, and for the sum mentioned.

The superior court, after hearing the testimony, found that the defendant Finch was trustee having charge of the matter of the bond for other persons, and that the averments in the fourth allegation of the complaint were true; that the respondent had performed his agreement; that the contract for partnership in prospecting and locating mines, as set forth in the fourth allegation of the complaint, was carried on, and that Johnson discovered the quartz mine described while such agreement existed; that the



mine was located in the names of Johnson and Whitcomb; that Johnson had excluded respondent from any interest therein, and that Johnson had made the conveyances and the bond alleged in the complaint. The tenth finding by <sup>236</sup> the court was that the deeds and bond were given for the purpose of cheating and defrauding respondent out of his interest in the claim; and the eleventh, that they were made without the knowledge or consent of respondent; that the claim is reasonably worth twelve thousand five hundred dollars; that Johnson had executed the deed and deposited the same with the defendant bank as alleged, and the bank had received the same; that Whitcomb was in good faith a locator, as alleged in the complaint, of the mining claim; that Johnson is insolvent and is now the owner of five-sixteenths of the Keystone Mining claim; that the respondent, by reason thereof, is owner of and entitled to the undivided one-half thereof; that is, is the owner of and entitled to receive one-half of the unpaid portion of the amount due from the defendant Finch, trustee, as the purchase price, that is, to nineteen hundred and fifty dollars; and decree was entered according to the prayer of the complaint.

Defendants moved for a new trial, which motion was overruled. Defendant Johnson excepts to several findings of fact, on the ground that the evidence is insufficient to justify the same. It is not necessary here to review the testimony. It has been carefully examined, and we are satisfied with the conclusions of fact reached by the superior court. The respondent and Johnson agreed to prospect together and share alike the benefits of any discovery or location of mining properties, water rights, and other things mentioned in the fourth allegation of the complaint. It is true there was but little investment, if any, beyond a small "grub stake," by either in the enterprise, but they were to put their labor into it. Each was to diligently and faithfully prospect. In mining operations this is usual. Frequently very humble and small beginnings lead to great results.

We observe no error in the superior court's ruling upon <sup>237</sup> the proposed amendment to the answer after the trial was concluded. The proposed amendment was inconsistent with the answer upon which the cause was tried, and, if made, could not have changed the result of the trial.

Defendant urges here that the contract between respondent and Johnson was oral and is within the statute of frauds, as expressed in section 1422 of 1 Hill's Code. This contention can-

not be maintained. The defendant Johnson, if the acquisition of the mine was an interest in real estate, would be a trustee. The weight of authority in the mining states is that such contracts are not within the statute of frauds: *Gore v. McBrayer*, 18 Cal. 583; *Hirbour v. Reeding*, 3 Mont. 15; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 203.

Appellant's answer to the fourth allegation of the complaint is a denial of information or knowledge sufficient to form a belief as to the facts set forth in the paragraph mentioned. It will be observed that the averment is an agreement between respondent and appellant. Presumptively, appellant had positive knowledge of these facts. The approved rule seems to be, when such knowledge is with the defendant, he cannot evade a positive denial by a disavowal of knowledge. We very much question whether the answer to the fourth paragraph of the complaint is sufficient to raise any issue of fact.

The judgment of the superior court is affirmed.

Scott, C. J., and Dunbar, Anders, and Gordon, JJ., concur.

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**MINING PARTNERSHIPS—AGREEMENT TO PROSPECT FOR MINES.**—An agreement to engage in the business of prospecting for, and in the development of, lode mining property, for the joint use of all, is also in the nature of a partnership agreement. Under it each party becomes the agent of the other: *Monographic note to Skillman v. Lachman*, 83 Am. Dec. 104, on mining partnerships.

**CONTRACTS—STATUTE OF FRAUDS—AGREEMENT TO PROSPECT FOR MINES.**—Where each of three persons locates a different mine in his own name, pursuant to an oral agreement that all mines located by either shall be owned in common by them, the statute of frauds has no application to prevent their being owners in common: *Eberle v. Carmichael*, 8 N. Mex. 696. Such agreement, not being within the statute of frauds, need not be in writing: *Meylette v. Brennan*, 20 Colo. 242.

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## BENTON v. JOHNCOX.

[17 WASHINGTON, 277.]

**RIPARIAN OWNERS—RIGHTS OF AS TO WATER.**—The right of a riparian owner to the natural flow of a stream by or across his land in its accustomed channel as incident to his estate passes by a grant of the land, unless specially reserved. It is not an easement in, nor an appurtenant to, the land, but is as much a part of the soil as the stones scattered over it.

**RIPARIAN OWNERS—RIGHTS OF NOT MODIFIED BY THE ARIDITY OF THE COUNTRY.**—By adopting the common law so far as not inconsistent with the constitution and laws of the United States nor incompatible with the constitution and condition of society in the state, the legislature of the state of Washington

adopted as a part of the law of the state the common-law rules respecting the rights of riparian owners, though in a large portion of the state the climate is arid and the soil incapable of profitable cultivation without the aid of irrigation.

**RIPARIAN PROPRIETORS—CONFLICT BETWEEN AND APPROPRIATORS OF WATERS ON THE PUBLIC LANDS.**—As between an appropriator of water on the public lands and a patentee from the United States, the title of the latter relates back to the first necessary proceeding on his part to acquire title to his land.

**WATERS.**—THE RIGHT TO APPROPRIATE WATER APPLIES ONLY to the public lands, and cannot be exercised to the prejudice of the rights of riparian proprietors.

THE RIGHT OF A RIPARIAN OWNER TO HAVE THE WATER FLOW through his lands cannot be prejudiced by an act of the legislature passed after the inception of his title.

THE RIGHT OF A RIPARIAN OWNER TO THE USE of water as it is accustomed to flow without diminution or alteration is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes.

James B. Reavis and I. P. Englehart, for the appellants.

D. J. Crowley and Whitson & Parker, for the respondents.

**278** **ANDERS, J.** An action was instituted in the superior court of Yakima county by the plaintiff Benton, a riparian proprietor on the Ahtanum river in said county, to restrain certain of the appellants from diverting the waters of said stream, and conducting the same to, and upon, their lands situated at a distance therefrom, for the purposes of irrigation. Three separate actions were also commenced by other parties seeking similar relief, and, by stipulation of all the parties and an order of the court, all of those causes were consolidated and tried in this action. Many riparian owners became parties by intervention and joined the plaintiffs in claiming the relief sought by them, and the defendants in the several causes were all made defendants in the consolidated case.

The complaint in each case, briefly stated, alleges riparian ownership on the part of the plaintiff, and appropriation of the water and the date thereof, and the use of the water for irrigation, and its diversion by the defendants. Each of the non-riparian landowners alleges ownership of lands, and appropriation and use of the water for irrigation, and date of such appropriation, and the making of valuable improvements on the land. And each party to the action avers that his land, without artificial irrigation, is arid and unproductive, and prays that he may be decreed entitled to a certain specified quantity of water for the purpose of irrigating his premises. The action involves



the rights of a multitude of farmers located on the banks of the river as well as those of a great number of nonriparian land-owners.

The evidence preserved in the record is exceedingly voluminous <sup>279</sup> but the facts deduced therefrom, and stated by the court, are so satisfactory to counsel that we have been relieved of the labor of examining it in detail. Of the ninety-one findings of fact made by the court, none of any special importance is disputed by counsel for appellants. The trial court awarded a perpetual injunction restraining each and every of the nonriparian owners of land from diverting, or interfering with, the water of the river. Appellants excepted to the conclusions of law as announced by the court, and to the whole decree as founded on erroneous conclusions of law, and here insist that the rights of all parties should be determined by this court by the application of the doctrine of appropriation, in accordance with the facts found by the superior court. It may be stated generally that the court found from the evidence the date when each party settled upon his land and took the initiatory step in the acquisition of title thereto, as well as the date at which he appropriated the water for agricultural purposes.

While the court recognized the existence, in this state, of the doctrine of prior appropriation, it nevertheless held that the plaintiff and plaintiff intervenors, who settled upon their respective lands, and acquired their title thereto by complying with the laws of the United States, and appropriated and used the water of the stream for irrigation and domestic purposes, prior to the diversion by appellants, were entitled to have the stream continue to flow as it naturally flowed, through or by their lands at the time their possessory rights attached. In other words, the court held that the respondents were entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy with intent to acquire the title of the government in pursuance of law. And this ruling of the trial court was not <sup>280</sup> at variance with the rule repeatedly announced by this court, and the territorial supreme court, except upon the question as to the date at which riparian rights become vested in lawful occupants of public land. That such rights, as well as the right of prior appropriation, have hitherto been recognized in the decisions in this state will be disclosed by an examination of the following cases: *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572;

Geddis v. Parrish, 1 Wash. 587; Crook v. Hewitt, 4 Wash. 749; Rigney v. Tacoma Light etc. Co., 9 Wash. 576; Isaacs v. Barber, 10 Wash. 124; 45 Am. St. Rep. 772.

Nor did the legislature disregard the rights of riparian owners in the general act of 1890, relating to appropriation of water for irrigation: 1 Hill's Code, sec. 1718, et seq.

On the contrary, sections 1761 and 1774 of that act especially recognize the existence of riparian rights, and we do not see anything in that statute, or the subsequent act of 1891 (Laws 1891, p. 327), evincing an intention on the part of the legislature to disregard such rights. But it is most earnestly insisted, by the learned counsel for appellants, that the common-law doctrine touching riparian rights is not applicable to the arid portions of the state, and especially to Yakima county; and this court is now urged to so decide, notwithstanding anything it may heretofore have said to the contrary. The legislature of the territory of Washington in the year 1863 (Laws 1863, p. 88), enacted that "the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory." The language of this provision <sup>281</sup> was changed by the state legislature in 1891 by omitting the words "of England," substituting the word "state" for "territory," and inserting the clause, "nor incompatible with the institutions and condition of society in this state" (Code Proc., sec. 108); but the meaning remains substantially the same. It thus appears that the common law must be our "rule of decision" unless this case falls within the exceptions specified in the statute. Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the courts, is not, in our judgment, inconsistent with the constitution or laws of the United States or of this state. Nor is it incompatible with the condition of society in this state, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition—a proposition to which, we apprehend, no one would assent for a moment. It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land, in its accustomed channel, is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in, or an appurtenance to, the land, but, as Angell says, is as much

a part of the soil as the stones scattered over it: Angell on Water-courses, sec. 5.

"By the common law," says the court in *Lux v. Haggin*, 69 Cal. 255, 390, "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned,"<sup>282</sup> and one of the purposes thereafter mentioned was irrigation.

In Washburn on Easements and Servitudes, fourth edition, pages 316, 317, the learned author says: "The right of enjoying this flow, without disturbance or interruption by any other proprietor, is one *jure naturae*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." (In this state, by statute, an adverse possession for ten years would destroy the right.)

And the law on this subject is laid down by Professor Pomeroy in language equally clear and explicit. He says: "The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility": Pomeroy on Riparian Rights, sec. 152.

While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific states and territories on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose: *Coffin v. Left Hand Ditch Co.*, 6 Colo. 446; *Drake v. Earhart*, 2 Idaho, 716; *Stowell v. Johnson*, 7 Utah, 215; <sup>283</sup> *Moyer v.*



Preston (Wyo., April 27, 1896), 44 Pac. Rep. 845; Clough v. Wing (N. Mex., Feb. 20, 1888), 17 Pac. Rep. 453; Trambley v. Lutermau, 6 N. Mex. 15.

But the legislatures of those states and territories have attempted to abolish the common-law doctrine relative to private property in watercourses and to riparian rights generally (Pomeroy on Riparian Rights, sec. 106), and the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely on the assumption that the rules of the common law were inapplicable, by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how can it be held that that which is an inseparable incident to the ownership of land, in the Atlantic states and the Mississippi valley, is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done, unless they can irrigate them with water taken from the Ahtanum river, is not sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that if the judgment of the court below is affirmed, their lands will again become a barren waste and cease to "blossom as the rose," it is equally true that, if the waters of the river are diverted from its channel, <sup>284</sup> the premises of the respondents will become unproductive and utterly worthless.

"The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow, that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated": McKinstry, J., in *Lux v. Haggin*, 69 Cal. 255.

The question of the applicability of the common-law in controversies respecting water rights, in the mineral districts of California, was lucidly discussed by Chief Justice Sanderson in *Hill v. Smith*, 27 Cal. 482. With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditchowners using the water of a stream for mining purposes, the learned chief justice said: "This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common-law touching water rights have been materially modified in this state upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *Sic utere tuo ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in <sup>285</sup> any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditchowners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use."

In *Atchison v. Peterson*, 20 Wall. 507, the supreme court of the United States stated, as claimed by appellants, that as respects the use of water for mining purposes the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. That action was brought by parties who were ditchowners for an injunction to restrain the defendants from carrying on certain mining operations

on Ten Mile creek in Montana, and the question of riparian rights does not seem to have been involved therein. In fact, in the course of the opinion it is observed that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship in respect to the waters of those streams," meaning the streams on the public lands, the waters of which were subject to appropriation and use under the customs obtaining among miners.

In *Basey v. Gallagher*, 20 Wall. 670, the question on the merits in the case, as stated by the court, was whether a right to running waters on public land of the United <sup>286</sup> States for the purposes of irrigation could be acquired by prior appropriation as against parties not having the title of the government; and the court held that it could. But the question of riparian rights was not in the case, and the court said that "neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present both parties stand upon the same footing; neither can allege that the other is a trespasser against the government, without at the same time invalidating his own claim."

But, in the later case of *Sturr v. Beck*, 133 U. S. 541, the question as to the rights of the riparian proprietor, as against an appropriator of the water, did arise and was determined by the court. The facts were that one John Smith settled on a tract of government land in the territory of Dakota in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to one Beck. He made his homestead application, or entry, on March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The waters of a certain creek flowed in its natural channel across Smith's homestead, and, in May, 1880, Sturr went upon that homestead, located a water right thereon, and constructed a ditch by which the waters of the creek were diverted to his own land. Beck went into possession under his deed from Smith and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, whereupon Sturr commenced an action to enjoin Beck from interfering with his alleged water right and ditch, and the use of the water of the creek. Sturr claimed the right to divert and use the waters of the stream for the purposes of irrigation by



virtue of a prior <sup>287</sup> appropriation, and Beck defended and asked affirmative relief on the ground of riparian ownership. It will thus be seen that the question there raised was identically the same as that which is presented for determination here. In that case it appeared that neither Smith, nor his grantee Beck, had ever diverted the waters of the creek from the natural channel prior to the location of the alleged water right by Sturr, but the court unanimously held that Smith's patent related back to the date of his homestead filing, and cut off completely the alleged claim of Sturr. The learned chief justice, in delivering the opinion of the court, after referring to the act of Congress of July 26, 1866 (Rev. Stats., sec. 2339), and the amendatory act of 1870, and quoting from the opinion in *Atchison v. Peterson*, 20 Wall. 507, said: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

And, after quoting certain sections of the Civil Code of Dakota, and setting out the local custom of diverting and appropriating the waters of flowing streams for the purpose of irrigation, he concluded the opinion in the following language: "The question is not as to the extent of Smith's interest in the homestead as against the government, but whether, as against Sturr, his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and <sup>288</sup> agree with the brief and comprehensive opinion of the supreme court to that effect."

It seems to us that the soundness of that decision can scarcely be doubted. While the court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws, and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. That case, it would seem, settles the law adversely to the contention of the appellants in this case. The doctrine that the

rights of a patentee or grantee of the government relate back to the first act of the settler necessary in the proceedings to acquire title is also announced in the following cases: *Shepley v. Cowan*, 91 U. S. 330; *Larsen v. Oregon Ry. & Nav. Co.*, 19 Or. 240; *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836. See, also, *Kinney on Irrigation*, sec. 210; *Union etc. Co. v. Dangberg*, 2 Saw. 450.

The trial court in this case followed the rule laid down in the case of *Sturr v. Beck*; 133 U. S. 541, and other cases above referred to, and in so doing, we think, committed no error. But it is claimed by appellants that the act of the territorial legislature entitled, "An act regulating irrigation and water rights in the county of Yakima, Washington Territory" (Laws 1873, p 520), fully authorized them to divert and use the waters of the Ahtanum river as they had done. It is, perhaps, sufficient to say with reference to that act, that the rights of many of the respondents who own riparian lands had attached, under the law as announced in the *Sturr* case, prior to its passage and were, therefore, in nowise affected by it. And besides, by the <sup>280</sup> first section of that act the respondents were entitled to the use of the water for the purpose of irrigating their lands "to the full extent of the soil thereof." Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public and become private property, it is no longer applicable: *Gould on Waters*, sec. 240; *Pomeroy on Riparian Rights*, sec. 30; *Curtis v. La Grande Water Co.*, 20 Or. 34.

It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the ninth section of the act of Congress of July 26, 1866, the substance of which is included in section 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and indeed to every one, that neither local customs nor state laws or decisions of state courts, could vest the title to public land or water in private individuals without the sanction of the owner, viz., the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands, but when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor.

"The object of the section [Rev. Stats., sec. 2339] was to give the sanction of the United States, the proprietor of the lands, to

possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands": *Jennison v. Kirk*, 98 U. S. 456, 457.

It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running <sup>290</sup> streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in *Gould on Waters*, section 217, where a number of English cases are cited; and in *Pomeroy on Riparian Rights*, section 125, it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes; and the author there cites several English and many American decisions in support of that declaration: See, also, 2 *Washburn on Real Property*, 5th ed., 367, 368; *Gould on Waters*, sec. 205; *Lux v. Haggin*, 69 Cal. 255, and cases cited; *Union etc. Co. v. Ferris*, 2 Saw. 177.

A careful consideration of all the questions raised on this appeal discloses no error, and the judgment is therefore affirmed.

Scott, C. J., and Gordon, J., concur.

Dunbar and Reavis, JJ., not sitting, being disqualified.

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**WATERS AND WATERCOURSES—RIPARIAN RIGHTS—USE OF WATER.**—The use to which different proprietors may apply the water of a stream which flows through their land is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land and a part thereof, and is an inherent element of the property which he has in the land itself: *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182; 54 Am. St. Rep. 337, and note. This right, however, is subject to the limitation that each riparian proprietor is entitled to the reasonable use of the water for domestic, agricultural, and manufacturing purposes: *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note. Riparian rights incident or appurtenant to no land cannot exist: *Lake Superior etc. Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679.

**WATERS AND WATERCOURSES — APPROPRIATION — RIGHTS OF APPROPRIATORS AND RIPARIAN OWNERS.**—The doctrine as to the appropriation of water which is peculiar to Pacific states and territories applies only to the public lands of the United States. Hence, where the absolute title to the soil upon



which a stream of water runs has passed from the government before any right to the water by prior appropriation has become vested in any other person, no such right can be acquired afterward, but the owner of the land is the owner of the stream and the common-law rule prevails. And a purchaser of such land, who has paid the purchase money and received his certificate, though no patent has issued, is recognized as having the common-law rights of a riparian owner: Monographic note to *Heath v. Williams*, 43 Am. Dec. 280. See monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799-817, discussing the appropriation of water.

## NATIONAL BANK OF COMMERCE v. LOCK.

[17 WASHINGTON, 528.]

**VENDOR'S LIEN.—THE ASSIGNMENT OF A NOTE** given for the purchase price of real property vests in the assignee a vendor's lien existing to secure the payment of such note.

**CONVEYANCE OF REAL PROPERTY—SHERIFF'S DEED —DESCRIPTION.**—A mortgage, decree of foreclosure, and sheriff's deed describing property as all the property, real, personal, and mixed, now owned or hereafter to be acquired by a mortgagor railway corporation, do not pass the title to a lot of land belonging to the corporation situated at a considerable distance from its road and not connected with or used in its operation.

Smith & Cole, for the appellant.

Josiah Collins and L. B. Stedman, for the respondent.

**529 DUNBAR, J.** On March 16, 1891, the Rainier Avenue Electric Railway Company was the owner in fee simple and in possession, free from encumbrance, of the east half of lot 20 (excepting a strip sixty-six feet wide off the south side thereof), of the plat of Lake Dell in King county, Washington, containing two acres of land. On that date said company executed and delivered to defendant Luke Lock a bond for a deed of said two acres, agreeing on or before two years to convey said premises to Lock, provided Lock on or before said two years paid to it the sum of six hundred dollars with ten per cent interest. Lock at that time, in consideration of the bond, executed and delivered to the order of the said Rainier Avenue Electric Railway Company his promissory note for six hundred dollars, payable on or before two years from said date, bearing ten per cent interest. Lock entered into possession of the land, erected a dwelling-house thereon and made other improvements, remaining in possession until about September, 1894, when he left the premises. On October 1, 1892, the note was transferred by the Rainier Avenue Electric Railway Company to the appellant, the National

Bank of Commerce of Seattle. At the time said note was assigned appellant was informed by said payee, the Rainier Avenue Electric Railway Company, that the payment of the note was secured by a lien upon real estate near Columbia, which is in the vicinity of said two acres of land. There is no dispute but that the plaintiff is still the owner and holder of said <sup>530</sup> note, no part of which has ever been paid. In fact, the court found that the plaintiff was the owner and holder of said note. Prior to the transfer of this note, viz., on August 20, 1892, the Rainier Avenue Electric Railway Company executed to one Edmiston a mortgage to secure payment of a promissory note, which said mortgage was, on October 7, 1892, duly filed for record in King county. Said note and mortgage were thereafter, for a valuable consideration and before maturity, assigned to Charles E. Cotting, who foreclosed said mortgage. At the sheriff's sale under said proceeding the property was purchased by F. H. Osgood, who subsequently sold the same to defendant, the Seattle & Rainier Beach Railway Company. This action was brought to foreclose the lien of the National Bank of Commerce of Seattle on the said two acres of land. The bond given to Lock was never recorded. At the trial, however, the allegations of the complaint in reference to the execution and delivery of the bond for the deed were proven, also the execution and delivery of the six hundred dollar note to said Rainier Avenue Electric Railway Company, and the assignment to plaintiff of the six hundred dollar note.

None of the defendants except the Seattle & Rainier Beach Railway Company appeared to contest plaintiff's claim to said two acres. Said defendant (respondent here) offered in evidence the mortgage of the Rainier Avenue Electric Railway Company to Edmiston, the sheriff's deed to Osgood, and the deed from Osgood to defendant, the Seattle & Rainier Beach Railway Company. The conclusion of the court was, after finding the facts which were substantially conceded, that the plaintiff had no interest: that plaintiff's complaint should be dismissed for lack of equity, and that the defendant, the Seattle & Rainier Beach Railway Company, is the owner of said premises free and clear from any right, title, or interest that said <sup>531</sup> Lock may have therein by, through, or under the bond or agreement hereinabove referred to.

It is contended by the appellant that with the assignment to defendant of the Lock note of six hundred dollars, there passed also the lien on said two acres. This contention, we think, is

correct under the authorities: 2 Jones on Liens, sec. 1119; Gessner v. Palmateer, 89 Cal. 89.

And it is insisted that if this be true there can be no adverse claim raised to plaintiff's title thereto except by the defendant Seattle & Rainier Railway Company. It is also insisted by the appellant that the mortgage executed to Edmiston by the Rainier Avenue Electric Railway Company was too indefinite in its description to establish a lien upon the land in question, and that the sheriff's deed to Osgood, the purchaser at the foreclosure sale, and the deed from Osgood to defendant, the Seattle & Rainier Beach Railway Company, were equally indefinite and fatal to the interests of the respondent. It is conceded that the respondent obtains its title, if title it has, through these instruments. In none of these instruments is the land in question referred to other than in the general description of all the property, real, personal, and mixed, now owned or hereafter to be acquired by the Rainier Avenue Electric Railway Company. The decree and order of sale provide that "said mortgaged property shall be sold as an entirety in one lot and shall not be severed or sold in parcels, but the same shall be sold absolutely and without any right of redemption, statutory or otherwise, after such sale."

It is contended by the respondent that there was no lien incident to the transfer or assignment of the Lock note, for the reason that it was given as security for the payment of the note already in existence. But it seems to us that under the finding of the court that the plaintiff was owner <sup>532</sup> and holder of said note and that it had not been paid, the manner in which it came into possession or ownership of it would not be material. The authorities are uniform in holding that a deed of this kind is invalid so far as the property not described is concerned.

Passing the want of description in the other exhibits, Mr. Freeman in his work on Executions, second edition, volume 2, section 281, says: "So the deed, being the conveyance of the defendant's title, and the final evidence of the extent of the purchaser's acquisition, ought to be specific and free from ambiguity." Again: "Where the description is so imperfect that it cannot be ascertained therefrom what property was levied upon or sold, the proceedings must be regarded as void, and, as a general rule, cannot be supported by showing by the officer what he intended to sell."

The description in all these exhibits, it must be seen, is of the character spoken of by the author. It would be impossible from



the mortgage recorded, from the notice of sale or from the deed, for a person to tell that the particular land in question here was mortgaged, levied upon, or sold: See, also, 2 Devlin on Deeds, sec. 1432; Herrick v. Ammerman, 32 Minn. 544.

Our statutes provide that the execution enforcing the decree shall contain a description of the mortgaged property. They also provide (Code Proc., sec. 500) that the notice of sale shall particularly describe the property to be sold. This rule of law in fact is not gainsaid by the respondent, but he insists that the law is different when applied to mortgages given by railroad companies, and many cases are cited to sustain the proposition that a decree ordering the sale of a railroad and of property rights and franchises thereunto appertaining or thereafter acquired <sup>533</sup> would be construed to cover the entire real estate owned by such company at the time of making the mortgage, and real estate subsequently acquired.

We have examined the cases cited by the respondent, but do not consider them in point from the fact that the cases involved real estate which was owned and operated for railroad purposes; for while the courts unquestionably hold this to be the law, none of them have gone to the extent of holding that this rule applies to land that is not owned by the companies for the purpose of aiding the operations of the railroad; but the inference, and even the announcement, in many of the cases cited is exactly to the contrary. It does not appear that this land was in any way connected with the operation of the road. In fact, it was situated a considerable distance from the road, and could not have been used in the operation of the road. No one would, therefore, have had notice of the transfer of this land either by the mortgage or any subsequent proceeding. In fact, in this case Osgood, the execution purchaser and respondent's grantor, frankly testified that he had no knowledge at the time of his purchase at said sheriff's sale that he was acquiring any title to the property in litigation herein; also, that he had no knowledge that he was conveying any interest or title in or to said land in his deed to defendant, and that said respondent herein did not know of any claim or title that it had to said land until approached by counsel for plaintiff in regard to the same about the time of the beginning of the present action.

We think the court misunderstood the law relative to mortgages by railroad companies, and that it committed error in its conclusions of law. The judgment will, therefore, be reversed

and the cause remanded, with instructions to grant the prayer of the plaintiff.

Scott, C. J., and Reavis and Anders, JJ., concur.

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**VENDOR AND PURCHASER—VENDOR'S LIEN.—THE ASSIGNMENT OF NOTES** taken for the purchase money of land transfers, as an incident, the vendor's lien: *Upland Land Co. v. Ginn*, 144 Ind. 434; 55 Am. St. Rep. 181, and note.

**CONVEYANCES—SHERIFF'S DEED—DESCRIPTION IN.**—In a sheriff's deed, the land sold must be described with reasonable certainty; accordingly, nothing will pass under the general clause, "all other, the land, etc., of the defendant": *Jackson v. Delancy*, 13 Johns. 536; 7 Am. Dec. 403. A sheriff's deed which describes the land conveyed as "all that plantation or tract of land lying in Sumner district" is void for uncertainty: *Broughton v. Birchmore*, Harp. 300; 18 Am. Dec. 654. See, also, *Cain v. Maples*, 1 Hill, 304; 26 Am. Dec. 184; *Huddleson v. Reynolds*, 8 Gill, 332; 50 Am. Dec. 702. But see *McCulloh v. Price*, 14 Mont. 320; 43 Am. St. Rep. 637, and note.

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## DAMON v. LEQUE.

[17 WASHINGTON, 573.]

**APPELLATE PROCEDURE.—THE STATUTE OF WASHINGTON** providing that, when an appeal is taken from a judgment by one party thereto, another party thereto similarly affected may join in the appeal within ten days, does not apply where the party taking the second appeal is an adverse party to the first appellant.

**APPELLATE PROCEDURE IN EQUITY CASES.**—Although in Washington the court will not, after the decision of an equity case on appeal, permit of further appeals, it will hear and decide several appeals so taken that all can be submitted to the court at the same time.

**STATUTE OF LIMITATIONS, QUESTION OF—HOW SHOULD BE PRESENTED.**—If a complaint clearly shows the plaintiff's cause of action to be barred by the statute of limitations, he must raise that question by demurrer; otherwise it may be presented by answer.

**JUDGMENT, MERGER BY.**—If a suit is brought upon a promissory note and to foreclose a mortgage given to secure its payment, and a judgment entered, and it is found necessary to reopen the case, to bring in parties improperly omitted from the original complaint, such note is not deemed merged in the judgment as against them, and they are, therefore, entitled to the defense of the statute of limitations, if it exists as against the note, though not as against the judgment.

**MORTGAGE—STATUTE OF LIMITATIONS—POWER OF MORTGAGOR AFTER CONVEYING PROPERTY.**—One who has conveyed real property cannot revive a mortgage thereof after the bar of the statute has become complete as against his grantee who has purchased the land without assuming any obligation to discharge the debt.

Byron Millett and E. L. Minard, for the plaintiffs.

Burke, Shepard & Woods, for the defendants.

<sup>574</sup> SCOTT, C. J. This action is founded upon the following facts: In December, 1877, one Iverson and wife executed their note to the plaintiff Albert O. Damon in the sum of nine hundred and fifty dollars and interest, due one year from date, and to secure payment thereof also executed to him a mortgage upon the lands in controversy in this action. Thereafter N. P. Leque obtained a sheriff's deed to said lands in pursuance of a purchase by him at an execution sale under a judgment rendered against Iverson in favor of one Haller, and said Leque and wife thereafter conveyed said lands to Peter Leque. Said sheriff's deed was executed in March, 1885, and said Leques entered into possession of the premises. Subsequently, in July, 1885, the plaintiff Albert O. Damon commenced an action to foreclose said mortgage against Iverson and wife, but did not make any of the Leques parties thereto. Iverson appeared in said action and admitted the validity of the claim. A decree of foreclosure was rendered, and the lands were sold in pursuance thereof to said plaintiff. In June, 1892, the present action was commenced by Damon and wife against N. P. and <sup>575</sup> Peter Leque and their respective wives, which purported to be one to remove a cloud from title and also to obtain possession of the lands. A general demurrer was interposed by the defendants, which was sustained by the court, and judgment rendered against the plaintiffs. Upon an appeal by them, this court held that the complaint, under the liberal rule with regard to construing pleadings recognized here, stated facts sufficient to entitle the plaintiffs to a foreclosure of the mortgage, and the judgment was reversed and the cause remanded for trial: *Damon v. Leque*, 14 Wash. 253. A trial was subsequently had and a judgment rendered in favor of the plaintiffs, from which both parties have appealed, the plaintiffs alleging that they were entitled to judgment in a greater sum than that allowed by the court, the defendants contending that the plaintiffs were not entitled to judgment at all upon the facts, on the ground that the statute of limitations had run against the claim, which statute the defendants had pleaded in their answer.

A motion is made to dismiss the appeal of the defendants because it was not taken within ten days after the plaintiffs had appealed, and because an independent or subsequent appeal



cannot be maintained in the same cause. But the defendants were not required to proceed under section 5 of the appeal act (Laws 1893, p. 121), because their interests were not similarly affected to those of the plaintiffs, within the meaning of the statute; and while, after the disposition of an equity cause, the court will not hear a subsequent appeal from the same judgment (Hill v. Sawyer, 14 Wash. 275), yet in a case like this, where the appeals are all perfected and the cause submitted to the court at one time, so the whole matter may be finally disposed of, they may be entertained, as the objections <sup>576</sup> stated in the case cited do not apply; and the motion is denied.

As the appeal of the defendants goes to the whole case, it will be first taken up, and several minor questions growing out of their contention will be first considered. The plaintiffs contend that the defendants are not entitled to the benefit of said statute in consequence of not having raised the question by a special demurrer to the complaint in accordance with sections 189 and 190, volume 2, of the code; and this position would be well taken if the defect clearly appeared upon the face of the complaint. But in this instance we are of the opinion that it did not so appear, and especially when considering the purported nature of the action; consequently, the defendants were entitled to raise the question by the answer.

It is further contended by the plaintiffs that the note was merged in the judgment and that this action must be regarded as upon the judgment, and that the statute of limitations had not run against it. But, under all the authorities, the Leques not having been made parties to the foreclosure suit, the judgment therein rendered against the Iversons can have no force against them, and could not cut off their right to plead the statute against the claim.

It is also contended by the plaintiffs that the allegations of the answer were insufficient to raise the question of the statute of limitations, but, without setting these allegations forth in detail, we are of the opinion that the statute was well pleaded.

Another contention arises upon the facts in the case with reference to the time of a partial payment made upon the note by Iverson. The lower court found that this payment was made at a time before the note matured, while the plaintiffs contend that it was made at a later date. We have examined the proofs in this particular and are satisfied <sup>577</sup> that the finding of the lower court is well sustained by the evidence, and consequently

the case turns upon the question of the right of the mortgagor to revive the mortgage after the bar of the statute had become complete, as against another party who had purchased the lands but was not obligated to pay the debt. The authorities are conflicting upon this question, but the great weight sustains the defendants on the proposition. The mortgagor could no more revive the mortgage in such a case than he could give a new mortgage upon the land: 2 Jones on Mortgages, 5th ed., secs. 1198, 1202; Wiltsie on Mortgage Foreclosures, enlarged ed., secs. 65, 410; 13 Am. & Eng. Ency. of Law, 760; Schmucker v. Sibert, 18 Kan. 104; 26 Am. Rep. 765; Day v. Baldwin, 34 Iowa, 380; Cottrell v. Shepherd, 86 Wis. 649; 39 Am. St. Rep. 919; Trustees v. Smith, 52 Conn. 434; Kendall v. Clarke, 90 Ky. 178; Zoll v. Carnahan, 83 Mo. 35; Newbould v. Smith, L. R. 33 Ch. Div. 127; Lord v. Morris, 18 Cal. 482.

There are some cases holding the contrary doctrine, on the ground that a purchaser of the land who buys while the mortgage is in force is placed in no worse position by a revivor of a mortgage than he was in when he purchased. But the greater number of cases, as well as the weight of authority, is against it. The statute of limitations is a statute of repose, and it would seem as though it should apply in this kind of a case as well as any other, and that a mortgagor, perhaps insolvent, should not have the power, many years after the bar of the statute had become complete, to revive a mortgage undischarged of record and make the same a charge upon the lands as against a subsequent purchaser, when evidence of payment or other defenses might have become lost.

Substantially the same principle has been recognized <sup>578</sup> upon a different state of facts. For instance, it is well settled that a partial payment by one joint debtor after the statute has run against the claim will not revive it as against the other joint debtors, but only against the party making the payment. Also that partial payments upon a mortgage debt, made by a purchaser of lands who has assumed payment of the mortgage, will not keep the claim alive as against the original debtor. And there are cases holding that partial payments by a mortgagor cannot be invoked to keep alive a mortgage where the lands have passed into the hands of a third party, even though the bar of the statute as against the debt was at no time in force; but with that question we have not to do in this case.

We are of the opinion that the contention of the defendants must be sustained. The judgment rendered against them is

therefore reversed and the cause remanded, with instructions to render a decree setting aside the deed executed to the plaintiff Damon in pursuance of the first action to foreclose, and adjudging the lands free of the mortgage lien.

Anders and Reavis, JJ., concur.

Dunbar, J., dissents.

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**MORTGAGE, REVIVING AFTER BARRED BY THE STATUTE OF LIMITATIONS.**—A mortgagor who has parted with the title to land cannot afterward revive the mortgage debt, if it has become barred by the statute of limitations, so as to continue the lien of the mortgage as against one who purchased when the mortgage appeared to be barred and without notice of the attempted revivor: *Cook v. Prindle*, 97 Iowa, 464; 59 Am. St. Rep. 424, and note.

**LIMITATIONS OF ACTIONS—PLEADING.**—The statute of limitations must be pleaded to be available at the trial: *Valz v. First Nat. Bank*, 96 Ky. 543; 49 Am. St. Rep. 306, and note. See *Searls v. Knapp*, 5 S. Dak. 325; 49 Am. St. Rep. 873, and note. As to whether or not the statute is available on demurrer where it appears on the face of the declaration that the cause of action did not accrue within the time provided by the statute, there is a conflict of authority. The principal case supporting the affirmative of the proposition is probably in accord with the weight of authority: *Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340; 79 Am. Dec. 284; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399, and note; *Coles v. Kelsey*, 2 Tex. 541; 47 Am. Dec. 661. See, contra, *Sleeth v. Murphy*, *Morris*, 321; 41 Am. Dec. 232; *Wapello Co. v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370, and note.

**JUDGMENT—MERGER OF CAUSE OF ACTION IN.**—The extended note to *Speed v. Hann*, 15 Am. Dec. 81-83, discusses the question as to when merger takes place. A debt is not merged in a judgment until a valid judgment has been obtained upon it: *Wixom v. Stephens*, 17 Mich. 518; 97 Am. Dec. 204, and note. A judgment which is ineffectual by reason of mistake in the name of one of the plaintiffs does not preclude them from bringing a new suit to recover upon the original consideration: *Wixom v. Stephens*, 17 Mich. 518; 97 Am. Dec. 204. See *Vanuxem v. Burr*, 151 Mass. 386; 21 Am. St. Rep. 458; note to *Evansville Gas Light Co. v. State*, 38 Am. Rep. 133, 134. A domestic judgment merges and extinguishes the cause of action for which it was rendered in the courts of the same jurisdiction: *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Barnes v. Gibbs*, 31 N. J. L. 317; 86 Am. Dec. 210.



## SWINBURNE v. MILLS.

[17 WASHINGTON, 611.]

**STATUTES, CONSTRUCTION OF.**—A statute entitled "An act relating to the sale of property under execution and the confirmation of sheriff's sales," and repealing certain designated sections of the act relating to the redemption of real estate sold on decree of foreclosure and execution, and providing that, in case of foreclosure of mortgages or other liens, nothing shall prevent a sale of the entire premises included within the mortgage or lien, applies to sales under decrees foreclosing mortgages.

**STATUTES, WHEN RETROACTIVE.**—A statute respecting sales under judgments and decrees declaring, "This act shall not apply to judgments entered prior to the taking effect thereof, nor to executions which shall issue thereupon," applies to judgments and decrees entered after its passage, though based upon contracts and transactions occurring before, and is to that extent retroactive.

**CONSTITUTIONAL LAW—IMPAIRING THE OBLIGATION OF CONTRACTS.**—If the effect of a contract is deteriorated or substantially lessened by the passage of an act, the obligation of the contract is impaired. The obligation of a contract is the means which, at the time of its creation, the law afforded for its enforcement.

**CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS --STAY AND APPRAISEMENT LAWS.**—A statute providing for a stay of execution for a year after the entry of a judgment of foreclosure and for the appraisal of the property and the vacating of any sale thereof which does not realize eighty per cent of such appraisement cannot be applied to pre-existing mortgages without impairing the obligation of contracts, and hence is unconstitutional if sought to be so applied.

C. M. Riddell, for the appellant.

O. G. Ellis, for the respondent.

**612 DUNBAR, J.** This is an appeal from a judgment of the superior court of Pierce county, granting a peremptory writ of mandamus against A. U. Mills, as sheriff of Pierce county, Washington, commanding the said sheriff to proceed with the sheriff's sale under the special execution and order of sale issued out of the clerk's office of said court, on the twenty-fourth day of June, 1897, in the action of Nathaniel R. Swinburne v. George E. De Lano, et al., and at once to advertise certain mortgaged property described in the decree in said cause for sale to satisfy the judgment in said cause, without appraisement and without requiring the judgment creditor or the judgment debtor, or either of them, to fix any value upon said mortgaged property, or any part thereof, as a minimum price to be paid at such sale, and to proceed at once to execute said order of sale under and pursuant to the old law regulating sales on special execution and order of sale on mortgage foreclosures, without regard to, or any compliance with, the provisions of the recent act of the legislature

regulating sales under execution, being chapter 50 of the laws of Washington of 1897, pages 70 to 76, inclusive. Without further stating the <sup>613</sup> case it will be sufficient to say that it involves the legality or application of the law just mentioned and entitled, "An act relating to the sale of property under execution and decree, and the confirmation of sheriffs' sales, and repealing sections 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, and 521 of volume 2 of Hill's Annotated Statutes and codes of the state of Washington relating to the redemption of real estate sold on decree of foreclosure and on execution."

The respondent insists that the act under consideration was not intended to cover the foreclosure of mortgages, or to interfere in any way with the law in relation to the foreclosure of mortgages, only in so far as it repealed the old law of redemption, whether such mortgages were executed before or after the said act went into effect, but was intended simply to apply, and does apply exclusively, to sales under executions. He contends: 1. That neither the title to, nor the body of, the act will sustain the contention that the law applies to the foreclosure of mortgages; 2. That it was not the intention of the legislature to make the act retroactive in its effect; and 3. That if the law does apply to the foreclosure of mortgages, and if it was the intention of the legislature to make the act retroactive, that portion of the act in relation to a year's stay of sale and the provisions for fixing a valuation by the judgment creditor or judgment debtor or by appraisement preliminary to any sale are unconstitutional and void, for the reason that they are obnoxious to section 10 of article 1 of the constitution of the United States which provides that "no state shall . . . pass any . . . law impairing the obligation of contracts" and section 23, article 1, of the constitution of this state, which provides that "no . . . law impairing the obligations of contracts shall ever be passed."

<sup>614</sup> We have considered with some care the first proposition presented by the respondent, viz., that the title to the act in question is not sufficient to include the foreclosure of mortgages, nor is there sufficient in the body of the act to include that subject; but we are inclined to think that considering the comprehensiveness of the word "decree," a holding that the word as used in the title did not apply to a decree of foreclosure would be too literal; and, while the body of the act is to some extent indefinite and uncertain, we think the inference which must necessarily be drawn from the provision in section 10, that "in case

of foreclosure of mortgages or other liens nothing shall prevent the sale of the entire premises included within the mortgage or lien," is that it was the intention of the act to include mortgages as well as property sold under execution.

We also think that it was the intention of the legislature to make the provisions of this act retroactive. Section 18 provides that "this act shall not apply to judgments entered prior to the taking effect thereof, nor to executions which shall issue thereupon, but proceedings thereunder shall be had in all respects, in the manner now provided by law, and redemptioners shall have the same right to redeem property sold upon judgments or decrees rendered prior to the taking effect of this act, as if this act had not been passed." It seems by this expression of the legislature plainly to have been their intention to subject judgments entered subsequent to the taking effect of the act to the operations of the new law without regard to the date of the contract. There can be no other reasonable inference deduced from the language used in section 18.

This brings us then to the third proposition, viz: Is the act unconstitutional so far as its application to contracts made prior to the passage of the act is concerned? It <sup>615</sup> will thus be seen that this case involves the principle of inviolability of contracts. This principle the courts have always protected, no matter from what quarter, or under what guise, it has been assailed, whether by a party to the contract who has sought to vary its terms, or by legislative enactments in his interests. It is a principle which is founded upon honesty and good faith, and finds its support in ethics as well as law, and it was recognized and enforced before it became a constitutional guaranty. It gives stability to business transactions. In fact, it makes them possible. It gives value to contracts, and without the upholding of this principle neither civilization nor governments could exist. A contract is an agreement to do or not to do a particular thing. The obligation is the binding force of the contract. The constitution prohibits the passing of laws which impair the obligation of a contract. The practical question then is, What is an impairment of a contract? Webster's definition of "impair" is, "To make worse; to diminish in quantity, value, excellence, or strength; to deteriorate." Then, if the value of a contract is deteriorated or lessened by the passage of an act, the obligation of the contract is most certainly impaired. Then the question arises, Was the contract of this mortgagee deteriorated or made less valuable by



the passage of this act? It is a principle of law so often enunciated and so uniformly maintained that the law which is in existence at the time a contract is made becomes a part of the contract that it would be idle to cite authorities on that proposition, or to further mention it. In this case, it is especially stipulated in the mortgage that the laws in force at the time the contract was made should become a part of the contract, but in the absence of such stipulation the effect would be exactly the same. Under the law in existence at the time the contract was made, the mortgagee <sup>616</sup> had a right to the sale of this land at once upon the issuance of his execution, subject only to the redemption provided for by law. This was a valuable right and a right no doubt that was taken into consideration by the judgment creditor, or, in this case, the mortgagee, when the contract was made. The law now compels him to wait more than a year after judgment before he can have the sale made. It seems to us to be beyond controversy that, as to antecedent contracts, this provision of the law is void.

Again, under the law in existence at the time the contract was made, the mortgagee had a right to have the property mortgaged sold, and to have the proceeds of the sale, whatever they might be, subjected to the payment of his judgment. Now a condition is imposed upon him that might defeat the recovery of his debt altogether. The land must be appraised, and, if it does not bring within eighty per cent of the appraised value, the sale will be set aside and may be set aside indefinitely. Under the present law, the more security in value that the mortgagee takes, the worse position he is placed in. For instance, if to secure a debt of one thousand dollars he takes security on land which will be reasonably valued at ten thousand dollars, the law subjects him to the necessity of finding a bidder who will pay eight thousand dollars for the land mortgaged. If he cannot find anyone else, in order to procure the benefits of the sale, he must bid the land in himself for that amount. He then has to be responsible for an outlay, for a purchase of the lands, which was never contemplated in his original contract. These provisions plainly lessen the value of his contract, because burdens are imposed upon him which did not exist when it was made.

But it is argued by appellant that no one has a vested interest in mere remedies. That is true when the remedy is merely a legislative direction as to methods of enforcement <sup>617</sup> which do not materially change the rights of the parties to the con-

tract, because then it would not impair the contract. But, as is said by the supreme court of the United States in *Bronson v. Kinzie*, 1 How. 311, "if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." This law goes beyond a regulation of the character that is spoken of in cases which hold that there is no vested right in remedies. The principles involved in this case have been so often passed upon by the courts of other states, and especially by the supreme court of the United States, in an unbroken line of decisions reaching from an early day up to the present time, that it is scarcely an open question here, because, being a constitutional provision of the United States, the United States courts have jurisdiction over such cases as this, and their decisions are binding upon state courts.

In *Louisiana v. New Orleans*, 102 U. S. 203, in an opinion rendered by Justice Field, the court said: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *Qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound—*Qui serius solvit, minus solvit*—he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

In *Louisiana v. Police Jury*, 111 U. S. 716, <sup>618</sup> the court held that by the obligation of a contract is meant the means which at the time of its creation the law affords for its enforcement.

In *Edwards v. Kearzey*, 96 U. S. 595, it was held that the provision in the constitution of a state which exempts from sale under execution every homestead not exceeding in value one thousand dollars, is invalid as regards contracts made before the adoption of the constitution. In the discussion of the principles involved, the court in that case said: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. . . . In *Green v. Biddle*, 8

Wheat. 1, this court said, touching the point here under consideration: 'It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.' 'One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force': *Planters' Bank v. Sharp*, 6 How. 301."

In *Seibert v. Lewis*, 122 U. S. 284, it was held that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the <sup>619</sup> contract is forbidden by the constitution, and is therefore void."

In *Bronson v. Kinzie*, 1 How. 311, the court said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In that case, it was held that "a state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts." So that it will be seen that the material question raised here was passed upon in that case. That case is particularly applicable to the condition imposed by the law under consideration in relation to the appraisement of the land to be sold and the requirement that it shall bring at least eighty per cent of the appraised value, for buyers of land at execution sale are inclined to place their own



estimate upon the value of the land sold, and will probably be very slightly influenced by an appraisement made thereon.

In *Sturges v. Crowninshield*, 4 Wheat. 122, it was decided by the supreme court of the United States, Chief Justice Marshall rendering the opinion, after a most elaborate <sup>620</sup> argument by eminent counsel, that the act of the legislature of the state of New York which liberated the person of the debtor and discharged him from all liability for any debt contracted previous to his discharge on his surrendering his property in the manner the act prescribed, was unconstitutional and void, so far as debts incurred prior to the passage of the act were concerned, for the reason that it impaired the obligation of a contract.

It is the impairment of the obligation which is interdicted by the constitution. The obligation is presumed to be valuable, and its value depends upon the power of either contracting party to compel the other to fulfill the conditions of the contract by a compliance with the requirements of the law in relation to such contract which was in effect when the contract was made and the obligation assumed. Or, in the more concise language of Chief Justice Marshall, "the obligation of a contract is the law which binds the parties to perform their agreement." It follows, then, that any material change of the law is an impairment of the obligation.

The supreme court of the United States, in *Walker v. Whitehead*, 16 Wall. 314, in discussing this question, said: "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment. . . . The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract <sup>621</sup> in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement, which

existed when it was made. The guaranty of the constitution gives it protection to that extent."

In *McCracken v. Hayward*, 2 How. 608, a case kindred to this, it was held that the law of the state of Illinois, providing that a sale shall not be made of property levied on under an execution unless it shall bring two-thirds of its valuation, according to the opinion of three householders, was unconstitutional and void.

*Howard v. Bugbee*, 24 How. 461, which is also a case in point on the third proposition involved here, held that a statute of the state of Alabama authorizing a redemption of the mortgaged property in two years after sale under a decree by bona fide creditors of the mortgagor was unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract.

And, finally, the supreme court of the United States, in the late case of *Barnitz v. Beverly*, 163 U. S. 118, decided May 18, 1896, after a review of the earlier cases, has settled the question of the right of possession which is involved in this case by deciding that a law of Kansas, which provided, in place of the previous mortgage foreclosure law under which the purchaser took an absolute title and possession upon the confirmation of the sheriff's sale, and issue of the sheriff's deed, that the mortgagor should have eighteen months for redemption with full right of possession during that time and forbidding another sale of the same land for any deficiency on the first sale, was unconstitutional as applied to a mortgage executed before its passage.

<sup>622</sup> Without further particularizing, the doctrine is announced in *Gantly v. Ewing*, 3 How. 707; *Ogden v. Saunders*, 12 Wheat. 213; *Cooley's Constitutional Limitations*, 5th ed., 346; 2 *Jones on Mortgages*, 3d ed., sec. 1321; 3 *Am. & Eng. Ency. of Law*, 751, and cases cited.

Many state courts have also decided the questions involved in this case, and such decisions have always maintained the inviolability of contracts.

The law, then, so far as the provisions in relation to the postponement of the sale and appraisalment of the land are concerned, being void, and section 630 of 2 *Hill's Code* not having been repealed, the minor provisions of the act are not material in this case, and the judgment will be affirmed.

Scott, C. J., and Anders, Gordon, and Reavis, JJ., concur.

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STATUTES—CONSTITUTIONALITY OF—IMPAIRING OBLIGATION OF CONTRACTS.—The obligation of a contract is impair-

ed by any law which prevents its enforcement or materially abridges the remedy which existed when it was contracted, and does not supply an alternative remedy equally adequate or efficacious: *People v. Common Council*, 140 N. Y. 300; 37 Am. St. Rep. 563, and note. A statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, but valid and operative as to future contracts: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329. See *International Bldg. etc. Assn. v. Hardy*, 86 Tex. 610; 40 Am. St. Rep. 870; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266, and note. An act may be unconstitutional so far as it has a retrospective application to past contracts, and constitutional as applied to future contracts: *Barry v. Iseman*, 14 Rich. 129; 91 Am. Dec. 262, and note. For examples of "stay laws" and redemption laws held unconstitutional, see *Scobey v. Gibson*, 17 Ind. 572; 79 Am. Dec. 490, and extended note; *Coffman v. Bank of Kentucky*, 40 Miss. 29; 90 Am. Dec. 311, and note.

**STATUTES—RETROACTIVE—EFFECT OF.**—A statute is retroactive if it creates a new right, rather than affords a new remedy to enforce an existing right: *Commissioners v. Rosche*, 50 Ohio St. 103; 40 Am. St. Rep. 653, and note; *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 483; 90 Am. Dec. 438, and note. Such act cannot affect a contract merged in a judgment at the time of its passage: *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236. See *Holyoke v. Haskins*, 5 Pick. 20; 16 Am. Dec. 372; extended note to *Kennebec Purchase v. Laboree*, 11 Am. Dec. 98.



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**2. APPELLATE PROCEDURE IN EQUITY CASES.**—Although in Washington the court will not, after the decision of an equity case on appeal, permit of further appeals, it will hear and decide several appeals so taken that all can be submitted to the court at the same time. (*Damon v. Leque*, 927.)

**3. APPELLATE PROCEDURE.—THE STATUTE OF WASHINGTON** providing that, when an appeal is taken from a judgment by one party thereto, another party thereto similarly affected may join in the appeal within ten days, does not apply where the party taking the second appeal is an adverse party to the first appellant. (*Damon v. Leque*, 927.)

**4. APPELLATE PRACTICE—AMOUNT INVOLVED.**—If the dismissal of an appeal by the intermediate appellate court leaves the judgment of the inferior court in full force to the effect that the matter involved is a subsisting conditional obligation for the payment of five thousand dollars, the amount in controversy exceeds one thousand dollars, the amount required by statute, and an appeal lies to the supreme court. (*Mutual Reserve etc. Assn. v. Smith*, 172.)

**5. APPELLATE PRACTICE.—A BILL OF EXCEPTIONS** to the exclusion of evidence, not approved by the trial judge, cannot be considered on appeal. (*McCullar v. State*, 847.)

**6. APPELLATE PRACTICE.—A GENERAL EXCEPTION TO A FINDING MADE AFTER THE CLOSE OF THE TRIAL**, when there was no opportunity to meet the point by amendment or otherwise, cannot be relied upon to raise any question which, if properly raised during the trial, might have been successfully met and answered. (*Bally v. Hornthal*, 645.)

**7. TRIAL—PRESERVING SUFFICIENCY OF EVIDENCE AS QUESTION OF LAW ON APPEAL.**—A party who desires to save for consideration in the appellate court the question whether, as matter of law, the evidence was sufficient to warrant the submission of the case to the jury, must, by motion presented to the court before submitting the case to the jury, have asked the court to exclude

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**8. APPELLATE PRACTICE, QUESTION OF FACT WHICH MAY NOT BE REVIEWED.**—If there is any evidence to support the conclusion of the subordinate court respecting an issue of fact, it cannot be reviewed by an appellate court having jurisdiction of questions of law only. (*Fairchild v. Edson*, 609.)

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**10. APPEAL — WRIT OF ERROR — INSANE DEFENDANT — NEXT FRIEND — GUARDIAN AD LITEM.**—It is not essential that the same person who represented an insane defendant, in a suit against him for divorce, as guardian ad litem, should appear as his next friend in a writ of error to reverse the decree, because the court has power to appoint or to accept another person to act in that capacity. (*Iago v. Iago*, 120.)

**11. APPEAL.**—A WRIT OF ERROR is a new suit, yet, when brought to review a decree of divorce, it is but a step in defense of the relief sought to be obtained by the complainant in the original bill. (*Iago v. Iago*, 120.)

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## ASSAULT.

**ASSAULT AND BATTERY—IMPROPER ADMINISTRATION OF DRUGS.**—If a druggist, at the request of a customer, puts an unusual dose of croton oil on a piece of candy, with knowledge or reason to believe that such dose is to be given to a third person as a trick, and not for medicinal purposes, and it is so given to the serious inconvenience and injury of such third person, the druggist is guilty of assault and battery. (*State v. Monroe*, 686.)

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## ASSIGNMENT FOR BENEFIT OF CREDITORS.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ESTOPPEL.**—If a creditor in one state under an assignment for the benefit of creditors therein participates in a consultation of creditors with the assignee, obtains leave of court to file exceptions to the latter's account, and presents and proves his claim, he is estopped from denying the validity of the assignment as to lands in another state. (*Kendall v. McClure Coke Co.*, 688.)

See Corporations, 15; Injunction, 6.

## ATTACHMENT.

**1. ATTACHMENT — GARNISHMENT — LIEN OF.**—Garnishment by plaintiff of a debt due the defendant creates an inchoate right to a lien upon the property of the garnishee. (*Montana Nat. Bank v. Merchants' Nat. Bank*, 532.)

**2. ATTACHMENT—GARNISHMENT—LIEN OF.**—If a garnishment has been levied by plaintiff upon a debt due the defendant, in



the hands of a third person and a creditor of the latter, with knowledge of the garnishment, subsequently brings an action against the garnishee, who is insolvent, a court of equity may interfere to preserve the inchoate right of lien created by the garnishment, and may divide the property of the garnishee between the claimants pro rata. (*Montana Nat. Bank v. Merchants' Nat. Bank*, 532.)

3. **ATTACHMENT—CORPORATE STOCK—SITUS.**—The situs of corporate stock, for the purposes of attachment and execution, is the domicile of the corporation, and that place only, which is within the state creating it. (*Ireland v. Globe Milling etc. Co.*, 756.)

4. **ATTACHMENT—CORPORATE STOCK—CONSTRUCTION OF STATUTE.**—A statute which authorizes "the attachment of the shares of the defendant in any corporation," etc., is to be construed in view of the fundamental principle that property is not subject to attachment unless it is actually or constructively within the jurisdiction of the court issuing the attachment. (*Ireland v. Globe Milling etc. Co.*, 756.)

5. **ATTACHMENT—STOCK IN FOREIGN CORPORATION—NONRESIDENT OWNER.**—Shares of stock in a foreign corporation owned by a nonresident defendant cannot be reached by attachment in this state, although the officers of the corporation are within the state and its business is being carried on here. (*Ireland v. Globe Milling etc. Co.*, 756.)

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1. **BANKS AND BANKING—BANKER'S LIEN ON DEPOSIT.**—As against third persons, a banker's lien for money loaned does not extend to money deposited with him by the debtor to be dealt with according to the customs and usages of banks. (*Niblack v. Park Nat. Bank*, 203.)

2. **BANKS AND BANKING—BANKER'S LIEN.**—If a bank holds a demand note, or a note past due, it has a right to charge it up against the maker's deposit account, and, if it does so before a check drawn by the depositor is presented for payment, it is entitled to hold the deposit as against a check afterward presented. (*Niblack v. Park Nat. Bank*, 203.)

3. **BANKS AND BANKING—BANKER'S LIEN ON DEPOSIT—INSOLVENCY.**—If a bank holds a demand note, or a note past due which it has not charged up against the maker's deposit at the time his check is presented for payment, it cannot hold the deposit as against the check; and the fact that the bank has suspended and passed into the hands of a receiver before the check is presented does not operate to transfer the drawer's deposit to the payment of his note, to the exclusion of the payment of such check. (*Niblack v. Park Nat. Bank*, 203.)

4. **BANKING—CHECK, PRESENTMENT OF FOR PAYMENT.**—A customer's check should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business. (*Western Wheeled Scraper Co. v. Sadilek*, 550.)

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**6. BANKING—CHECKS, CHARGING DRAWERS AND INDORSERS.**—It is the duty of the drawee bank to promptly pay the check on the receipt thereof for collection, or to give notice of dishonor, in order to charge the drawer and indorsers. If the check is received by such bank, and there is no question but the drawer has moneys therein sufficient to pay it, its failure to at once make payment is a dishonor of the check, of which the drawer is entitled to notice by the first regular mail on the day following, and such notice not being given, he is released. (*Western Wheeled Scraper Co. v. Sadilek*, 550.)

**7. BANKERS—DRAFT AND SEALED PACKAGE, WHAT IS A DELIVERY OF CONTRARY TO INSTRUCTIONS.**—If a draft and a sealed package are sent to a bank, accompanied by the instruction, "papers to be delivered only upon payment of the draft," no information being given as to the contents of the package, and the bank allows the drawee to open the package and examine its contents, it is not guilty of any breach of the instructions, and therefore is not liable to the sender, though the package contains a report upon reading which the drawee found to be adverse to his interest, and he consequently refused to make payment of the accompanying draft. (*People's Nat. Bank v. Freeman's Nat. Bank*, 279.)

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#### BILLS OF LADING.

**1. CARRIERS.**—BILL OF LADING stamped on its face with the word "released" exempts the carrier from his common-law liability as an insurer. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**2. CARRIERS.**—A BILL OF LADING AS A RECEIPT is an acknowledgment of the quantity, character, and condition of the articles delivered and received, and as such may be explained, varied, or contradicted like other receipts. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**3. CARRIERS.**—A BILL OF LADING IS BOTH A RECEIPT AND A CONTRACT.—As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing, cannot be explained, nor its legal effect changed by parol evidence, in the absence of fraud or mistake. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

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though they recite that they are secured by the mortgage, do not make the terms of the mortgage a part of the contract so as to give a right of action for the principal of the bonds before maturity, as the mortgage clause, making the debt fall due upon default in the payment of interest, is merely intended to give the trustees a right of action upon the bonds for the foreclosure of the mortgage, and not to give a right of action upon default, independently of foreclosure proceedings. (*American Nat. Bank v. American Wood Paper Co.*, 746.)

See Negotiable Instruments, 1, 2.

#### BOUNDARIES.

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2. **BOUNDARIES.—IN CONVEYANCES CALLING FOR A LAKE AS A LINE**, the line at which the water usually stands when free from disturbing causes is the boundary of the land. (*City of Chicago v. Ward*, 185.)

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#### BRIBERY.

1. **IN AN INDICTMENT FOR OFFERING A BRIBE TO A JUROR** it is necessary to state the amount or the thing offered. It is not sufficient to charge that the accused offered, or caused to be offered, a bribe of money or thing of value. (*State v. Howard*, 403.)

2. **IN AN INDICTMENT FOR OFFERING A BRIBE TO A JUROR**, or for causing it to be offered, it is necessary to aver directly the official capacity of the person to whom the bribe was offered, knowledge on the part of the offerer of such capacity, the fact that the thing offered was of value, and to influence the official action of the person to whom it was offered. (*State v. Howard*, 403.)

#### BROKERS.

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#### BURDEN OF PROOF.

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#### BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS, EFFECT OF INSOLVENCY UPON EXISTING MORTGAGES TO.**—Upon the appointment of a receiver of a building and loan association on the ground of its insolvency, the loans made by it to its members and mortgage notes given by them to it become immediately due, regardless of the time of payment specified therein. (*Curtis v. Granite State etc. Assn.*, 17.)

2. **BUILDING AND LOAN ASSOCIATIONS, EFFECT OF INSOLVENCY UPON THE RIGHT TO COLLECT PREMIUMS.**—Upon the insolvency of a building and loan association and the appointment of a receiver of its assets, it is, for all practical purposes, prematurely dissolved, and premiums remaining due and payable as bonuses for granting loans become uncollectible, because the promise to pay such premiums was made upon the implied condition



that the association should remain a going concern. (*Curtis v. Granite State etc. Assn.*, 17.)

**3. BUILDING AND LOAN ASSOCIATIONS, INSOLVENCY, DISPOSITION TO BE MADE OF PREMIUMS PAID.**—Upon the insolvency of a building and loan association and its practical premature dissolution thereby, borrowers who have made payments of premiums in consideration of receiving their loans are entitled to be credited with the amount of such premiums in reduction of their indebtedness. (*Curtis v. Granite State etc. Assn.*, 17.)

**4. BUILDING AND LOAN ASSOCIATIONS, INSOLVENCY, DISPOSITION TO BE MADE OF DUES PAID BY MEMBERS.**—Upon the insolvency of a building and loan association and its practical dissolution by the appointment of a receiver, members indebted to it who have paid the dues upon their stock are not entitled to be credited the amount of such payments in reduction of their indebtedness. They must suffer their share of the loss of the association, and all they can be permitted to receive on account of their payment of dues on their stock is a pro rata dividend with the nonborrowing members of such assets as may remain after the satisfaction of the debts of the association. (*Curtis v. Granite State etc. Assn.*, 17.)

### BURIAL RIGHTS.

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### BY-LAWS.

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### CARRIERS.

**1. CARRIERS.**—A BILL OF LADING may, by its terms, exclude the common-law liability of the carrier as an insurer, although it cannot exempt him from liability for negligence. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**2. CARRIERS — CONNECTING LINES — LIABILITY — NEGLIGENCE.**—If the condition of the contents of a case of goods is unknown to a carrier or connecting carrier when it receives it for transportation, a failure to guard against liability for the condition of such goods by examination or stipulation is negligence. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**3. CARRIERS — CONNECTING LINES — PRESUMPTION OF NEGLIGENCE.**—If a connecting carrier receives goods from a preceding carrier apparently in good condition, and marks the bill of lading therefor "O. K.," a rebuttable presumption is raised that damage to the goods, if any, occurred in his line. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**4. CARRIERS—CONNECTING LINES—DAMAGE TO GOODS—PRESUMPTION.**—Among connecting lines of carriers, the one in whose hands goods in transit are found damaged is presumed to have caused such damage, and the burden of proof is upon him to rebut such presumption. (*Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 679.)

**5. CARRIERS, RECOVERY FROM FOR EXCESSIVE CHARGES.**—If a carrier renders a bill to a shipper of eggs, and charges as for a specified weight for each case, and the shipper pays accordingly, this does not constitute a settlement which will bar a recovery for overcharges. Nor is it any defense to the action that the weights charged were based upon the averaging of a few cases weighed where this fact was unknown to the plaintiff, and, therefore not the result of any agreement with him. (*Higley v. Burlington etc. Ry. Co.*, 250.)

**6. CARRIERS—ONE BECOMES A PASSENGER, WHEN.**—One does not become a passenger until he has put himself in charge of the carrier for transportation, and has been expressly or impliedly received as a passenger by the carrier. (Illinois Cent. R. R. Co. v. O'Keefe, 68.)

**7. CARRIERS—STATUS OF PASSENGER IS NOT CREATED BY PASS OR TICKET.**—The fact that one holds a free pass over a route, or has purchased a ticket, does not make one a passenger unless he comes under the charge of the carrier, and is accepted for carriage by virtue of it. (Illinois Cent. R. R. Co. v. O'Keefe, 68.)

**8. A RECEIPT MAY BE VARIED BY PAROL EVIDENCE,** though not obtained by fraud or mistake. Hence, receipts given by a carrier to a shipper specifying the weights of the articles shipped do not preclude the latter, in an action to recover for overcharges, from proving by parol evidence that such weights were incorrectly designated in such receipts. (Higley v. Burlington etc. Ry. Co., 250.)

See Bills of Lading; Damages, 2; Sales, 2.

### CEMETERIES.

**BURIAL RIGHTS.—BEFORE THE BODY OF A DECEASED HUMAN BEING IS BURIED,** there is a right vested in the husband or wife or next of kin to possession, for the purpose of burial or other legal disposition of it. (Burney v. Children's Hospital, 273.)

### CHATTEL MORTGAGES.

**1. MORTGAGE OF CHATTELS, DESCRIPTION OF PROPERTY.**—A mortgage of animals, stating their species, number and ages, and giving the color of some of them, is fatally defective where it does not show the ownership, possession, or location of any of them. Nor is the description made sufficiently definite by a covenant in the mortgage to preserve and care for the property, not to remove it from a designated county, and to warrant and defend it against the claims of all persons. (State Bank v. Felt, 253.)

**2. MORTGAGE OF CHATTELS—WHAT CONSTITUTES—AFTER-ACQUIRED PROPERTY.**—If one agrees to sell another a stock of goods, but reserves title in himself until the purchase price is paid, and it is provided that all "substituted goods, as well as all others used in the business," shall be subject to the lien and operation of the agreement, the contract, as to property subsequently acquired, including stock purchased by the vendee, operates as a mortgage, and is void as to creditors of the buyer unless it, or a copy thereof, is filed as required by statute. (Hudson v. McKale, 310.)

**3. NOTICE, WHEN MUST BE ALLEGED AND PROVED.**—If a holder of a chattel mortgage, which is adjudged not to contain a sufficient description of the property mortgaged, wishes to insist that a second mortgagee had notice of the property intended to be included in the first mortgage, he must allege and prove such notice. (State Bank v. Felt, 253.)

**4. CHATTEL MORTGAGE.—THERE IS NO PRESUMPTION** that a mortgagor is the owner of chattels which he mortgages. Hence, neither his execution of the mortgage nor the placing therein of a covenant against the claims of all other persons amounts to an affirmation, as a matter of description, that the property mortgaged is owned by him. (State Bank v. Felt, 253.)

See Insurance, 5.

### CHECKS.

**1. BANKS AND BANKING—CHECK AS ASSIGNMENT OF FUND.**—The drawing and delivery of a check upon a fund in a

bank are in effect an assignment to the holder of the check of so much of the fund as the check calls for. (*Niblack v. Park Nat. Bank*, 203.)

**2. BANKS AND BANKING—CHECKS—PRESENTMENT.**—If a notary public takes a check to the bank upon which it is drawn during banking hours for the purpose of demanding payment, but, finding the bank closed, makes such demand upon its president, the check is properly presented. (*Niblack v. Park Nat. Bank*, 203.)

**3. BANKING, CHECK PAID BY MISTAKE, RECOVERY UPON.**—If a check is paid by mistake, the payer must return, or offer to return, it to the payee before the former can maintain an action to recover the amount so paid. (*Northampton Nat. Bank v. Smith*, 283.)

**4. COUNTY TREASURER, DEPOSIT BY OF PUBLIC FUNDS IN A PRIVATE BANK.**—Neither the propriety nor the validity of a deposit by a county treasurer of the public funds in a private bank can be considered in a collateral proceeding. Hence, if he draws a check on such a deposit and gives it to a creditor of the county, who fails to have it presented and collected with due diligence, or to give notice of its dishonor, the treasurer is released from liability to him. (*Western Wheeled Scraper Co. v. Sadilek*, 550.)

**5. BANKING—CHECKS, PAROL EVIDENCE TO VARY.**—Parol evidence is admissible to prove that at the time a check was drawn the parties thereto agreed that it should not be presented for payment to the drawee until a time fixed by them, in which event the payee is excused for delay in presenting it until the time so specified. (*Gray v. Anderson*, 243.)

See Banks.

#### COLLATERAL ATTACK.

See Judgment, 14; Process, 1.

#### COLLATERAL SECURITY.

See Insurance, 9-12; Negotiable Instruments, 12, 13.

#### COMMON LAW.

See Pleading, 2; Waters, 3; Wills, 7.

#### CONCEALED WEAPONS.

**CARRYING WEAPONS—BRASS KNUCKLES.**—Under an information charging a defendant with carrying "brass knuckles," evidence is admissible that the knuckles were made of any metal or hard substance. (*Louis v. State*, 832.)

#### CONSPIRACY.

**1. CONSPIRACY—WHEN COMBINATION IS IMMATERIAL.** What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed are not unlawful. (*Mauley v. Tierney*, 770.)

**2. EVIDENCE OF ONE CONSPIRATOR, WHEN NOT ADMISSIBLE AGAINST ANOTHER.**—Declarations or admissions of one conspirator made after a criminal conspiracy has been consummated are not admissible as evidence against another. (*State v. Rice*, 816.)

**3. CONSPIRACY—BILL IN EQUITY FOR—WHAT MUST APPEAR.**—To maintain a bill in equity on the ground of conspiracy, it must appear that the object relied on as the basis of the con-



spiracy, or the means used in accomplishing it, are unlawful. Otherwise, there is no ground for the charge of conspiracy, and the fact of combination is immaterial. (*Macauley v. Tierney*, 770.)

### CONSTITUTIONS.

**1. CONSTITUTIONAL LAW—RIGHT TO HAVE TRIAL GO ON AFTER IT IS BEGUN.**—A constitutional provision declaring that: "No person shall, after an acquittal, be tried for the same offense," is a guaranty not only of the right to absolute immunity from a charge after an acquittal, but of the right to have a trial go on after it is begun, except in cases where it becomes impossible for the jury to proceed to a verdict. (*State v. Nelson*, 780.)

**2. CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional guaranty "that in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury, and shall be confronted with the witnesses against him," requires that on the trial of a criminal prosecution before a jury the accused shall be confronted with the witnesses against him, and testimony taken at the preliminary examination, although in the presence of the accused and when he has the right to cross-examine the witnesses, cannot be used as original evidence against him on the final or any subsequent trial of the case. (*Cline v. State*, 850.)

**3. CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional and statutory guaranty to the accused of the right upon his trial to be confronted with the witnesses against him, except in certain cases provided for when depositions have been taken, excludes all testimony except that of the confronting witnesses, and such depositions as have been taken in conformity with the law. (*Cline v. State*, 850.)

**4. CONSTITUTIONAL LAW—RIGHT TO BE CONFRONTED WITH WITNESSES.**—A constitutional guaranty of the right of an accused to be confronted with the witnesses against him on his trial is not a rule of evidence, and cannot be avoided on the ground of necessity. The fact that the accused has been confronted with such witnesses on his preliminary examination does not satisfy the constitutional guaranty; he must be confronted with them on his trial before a jury. (*Cline v. State*, 850.)

**5. CONSTITUTIONAL LAW—SEIZURE OF PRIVATE PROPERTY FOR EVIDENCE IN CRIMINAL CASES.**—A court has no power to direct officers of the law to enter the private inclosure of a person and there seize his lawful property, to be held as evidence against an alleged criminal. Such a seizure is unwarranted and unreasonable, and is prohibited by both the state and national constitutions. Hence, such officers cannot be authorized to enter a private inclosure and to take from the owner's possession a wrecked boiler and its appurtenances for use as exhibits upon the trial of another person for manslaughter, where death resulted from the latter's criminal negligence, as engineer, in causing the explosion of the boiler. (*Newberry v. Carpenter*, 346.)

**6. CONSTITUTIONAL LAW.—WHETHER A FINE IS EXCESSIVE AND UNJUST** is a question of law, and the courts will not adjudge a fine to be so disproportionate to the offense as to come within the constitutional prohibition, unless there is a plain conflict between the supreme law and an enactment of the legislature. (*State v. Main*, 30.)

**7. CONSTITUTIONAL LAW.—SUMMARY PROCEEDINGS FOR THE ABATEMENT OF WHATEVER** is dangerous to the public life or safety are often necessary, and have always been permitted when authorized by appropriate legislation. Hence an in-

spector may be authorized to destroy fruit trees infected by a disease specified in the statute and commonly believed to be contagious. (*State v. Main*, 30.)

### CONTAGIOUS DISEASE.

See Constitutions, 7; Trial, 5.

### CONTEMPT.

**CONTEMPT IN QUO WARRANTO PROCEEDINGS.**—If the relator is in office by virtue of a judgment of the supreme court of the state in quo warranto proceedings, any attempt by the defendant to exercise the functions of such office, or to interfere with the full and free exercise thereof by the relator, or any attempt by anyone else to interfere by alleged legal process or otherwise, before such judgment is reversed, is a contempt of court. (*Caldwell v. Wilson*, 672.)

### CONTRACTS.

**1. CONTRACTS.—TO EXCUSE NONPERFORMANCE** it must appear that the act to be done could not by reasonable means have been accomplished. Mere difficulty of performance is not enough. (*Matthews v. American Cent. Ins. Co.*, 627.)

**2. CONTRACTS—VOID IN PART VOID IN TOTO.**—If any part of an indivisible promise or any part of an indivisible consideration for a promise is illegal, the whole is void, and no action can be maintained thereon. (*Case v. Smith*, 341.)

**3. RESTRAINT OF TRADE—THREAT TO WITHDRAW PATRONAGE—COERCION.**—A threat of the withdrawal of patronage from wholesale dealers, unless they comply with a certain condition as to patronage, does not amount to coercion, where they are free to comply with the condition, or not, as they see fit. One may bestow his patronage on whomsoever he chooses, and annex any condition to its bestowal that he may wish. (*Macauley v. Tierney*, 770.)

**4. RESTRAINT OF TRADE—AGREEMENT AMONG MEMBERS OF ASSOCIATION AS TO BESTOWAL OF PATRONAGE.** If the members of an association of master plumbers wish to free themselves from the competition of those who are not members, they may lawfully accomplish that object by an agreement among themselves not to deal with wholesalers who sell plumbers' supplies to those not members of the association, as such agreement is not unlawful. (*Macauley v. Tierney*, 770.)

**5. CONTRACTS—STATUTE OF FRAUDS—LEASE OF LANDS.** An executory parol agreement to make a lease of lands for one year, with the privilege of three, at an annual rental, is void under the statute of frauds, and no action can be founded thereon. It cannot, therefore, be made a basis on which to recover damages for a breach of contract. (*Hand v. Osgood*, 312.)

**6. RESCISSION.**—One wishing to rescind a contract and to recover what has been paid under it must first restore whatever of value he has received. (*Northampton Nat. Bank v. Smith*, 283.)

See Bills of Lading, 3; Corporations, 27; Officers, 5.

### CONTRIBUTION.

**1. CONTRIBUTION.—THE LIABILITY** to contribute does not depend on a contract between the parties who are held liable to contribution, nor is it any defense that the transactions out of which it grew happened at different times. (*McBride v. Potter-Lovell Co.*, 265.)

**2. CONTRIBUTION BETWEEN PLEDGEE'S WHOSE PROPERTY WAS WRONGFULLY PLEDGED BY THEIR PLEDGOR.**—Where notes belonging to different persons are placed in the hands of a broker for sale, and he wrongfully pledges them to an innocent pledgee as security for his own debt, who collects some of such notes and pays such debt, the persons whose notes are thus collected may maintain a suit against all the persons whose notes were thus pledged to compel them to contribute ratably to the loss sustained. (*McBride v. Potter-Lovell Co.*, 265.)

See Agency, 2.

#### CONVEYANCES.

See Boundaries; Deeds; Easement.

#### CORPORATIONS.

**1. CORPORATIONS—RESIDENCE OF.**—A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although by comity it may be allowed to do business, through its officers and agents, in other jurisdictions. (*Ireland v. Globe Milling etc. Co.*, 756.)

**2. CORPORATION, POWER OF TO SELL ITS PROPERTY, AND DISCONTINUE BUSINESS.**—It is competent for any business corporation to sell its property, pay its debts, divide its assets, and wind up its affairs, especially if it is in an embarrassed condition. (*Bartholomew v. Derby Rubber Co.*, 57.)

**3. CORPORATION, POWER OF.—THE LEASE OF THE ENTIRE PROPERTY AND BUSINESS OF A CORPORATION** for a term of years made in good faith and without fraud, the lessee agreeing to continue the business which the corporation was organized to carry on, is not ultra vires nor void, if the corporation was in such a condition that the business could not be made profitable under its management for want of capital, nor will such lease be set aside or disregarded at the instance of a minority of the stockholders of the corporation. (*Bartholomew v. Derby Rubber Co.*, 57.)

**4. CORPORATIONS—STOCKHOLDERS, AGREEMENT OF AND ITS EFFECT.**—The members of a corporation cannot, like the members of a copartnership, make an agreement among themselves informally. The corporation must act as a body. (*Dennis v. Joslin Mfg. Co.*, 805.)

**5. CORPORATIONS—AGREEMENT FOR STOCK SUBSCRIPTION—MEANING OF WORD "BY."**—An agreement that a subscription to the capital stock of a corporation is not to become binding unless a certain amount is subscribed "by" a certain day, becomes binding if such amount is subscribed on the night of the day named. (*Elizabeth City etc. Mills v. Dunstan*, 654.)

**6. CORPORATIONS.—A STOCKHOLDER CANNOT ESCAPE LIABILITY** by a transfer to an insolvent assignee of stock issued for property accepted at a gross overvaluation. (*Wishard v. Hansen*, 238.)

**7. CORPORATIONS, STOCKHOLDER, WHEN CHARGED WITH NOTICE THAT THE STOCK WAS NOT FULLY PAID UP.**—If a certificate of stock purports to be fully paid up, but nevertheless that it may be assessed to raise moneys to pay certain mortgage indebtedness, and also for improving the property of the corporation, and other necessary expenses, and the purchaser thereof knows the amount of the capital stock of the corporation and the value of its property and that the property which was the basis of the stock was of much less value than the amount of such capital stock, and is not shown to have believed that such property equaled



the par value of the stock, the court is justified in finding that the purchase was made with knowledge that the stock had not been fully paid up and that the purchaser was liable for the residue. (*Wishard v. Hansen*, 238.)

**8. CORPORATIONS, STOCK ISSUED AT AN OVERVALUATION.**—Where the capital stock of a corporation is issued to one of its promoters or organizers for property taken at a gross overvaluation, the transaction is fraudulent as against creditors of the corporation if it be insolvent, and a stockholder who receives such stock with knowledge of the consideration paid for it is liable to such creditors on the stock he holds for the difference between its par value and the amount actually paid to the corporation for it. This is true not only of an original stockholder, but of those who acquire stock with knowledge of the facts. (*Wishard v. Hansen*, 238.)

**9. CORPORATION—FORFEITURE OF STOCK FOR UNPAID SUBSCRIPTIONS—BY-LAWS.**—A corporation may be empowered to provide by its by-laws for the sale of the stock of a subscriber who makes default in the payment of assessments, and such by-laws, if reasonable, may be enforced by the courts. (*Elizabeth City etc. Mills v. Dunstan*, 634.)

**10. CORPORATIONS—BY-LAWS—LIMITATION UPON ENACTMENT OF.**—If power is conferred upon a corporation, by the provisions of a particular charter, or by a general statute, to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication. (*Ireland v. Globe Milling etc. Co.*, 756.)

**11. CORPORATIONS—UNAUTHORIZED BY-LAW RESTRICTING SALE OF STOCK.**—A corporation having statutory authority to enact by-laws, to determine the manner of calling and conducting meetings, the number of members that constitute a quorum, the number of votes to be given by the shareholders, the mode of voting by proxy and of selling shares for neglect to pay assessments, is not empowered to enact a by-law providing that no stockholder shall sell his stock to any person unless he shall first offer the same to the corporation at the lowest price for which he is willing to sell it. (*Ireland v. Globe Milling etc. Co.*, 756.)

**12. CORPORATIONS—ASSETS AS TRUST FUND.**—The creditors of a corporation have no lien upon its assets as a trust fund held for their benefit. (*Ames v. Heslet*, 496.)

**13. CORPORATIONS—TRUST FUND, ASSETS OF, WHEN CONSTITUTE.**—The only sense in which it can be said that the assets of an insolvent corporation are trust funds when in the hands of the managing board of directors, is that the assets must be used in the discharge of corporate obligations before any portion can be absorbed by the directors in payment of stock or certificate obligations to the stockholders, whether they be director or non-director stockholders. (*Butler v. Harrison Land etc. Co.*, 464.)

**14. A CORPORATION, THOUGH INSOLVENT, MAY PREFER some creditors to others, even though such creditors are among its directors.** (*Butler v. Harrison Land etc. Co.*, 464.)

**15. CORPORATIONS—INSOLVENT—PREFERENCES BY.**—An insolvent corporation may make an assignment for the benefit of creditors, with preferences. (*Ames v. Heslet*, 496.)

**16. CORPORATIONS, PREFERENCES BY.**—If one corporation becomes the holder of the stock of another, the officers of the former, acting in its behalf and also on behalf of the latter, cannot prefer a debt due from the latter to the former, especially where the preference absorbs all the assets of the debtor corporation. (*Campbell etc. Mfg. Co. v. Marder, Luse & Co.*, 573.)

**17. CORPORATIONS, PREFERENCES OF DIRECTORS.**—A corporation may not prefer a debt owing to its own directors, or for the payment of which they are sureties. (*Campbell etc. Mfg. Co. v. Mar-der, Luse & Co.*, 573.)

**18. CORPORATIONS—PREFERENCES IN FAVOR OF DIRECTORS—ATTACK UPON BY OTHER CREDITORS.**—If an insolvent corporation disposes of all its assets by transferring them to directors in satisfaction of debts due to them, another creditor who afterward procures a judgment against the corporation, and levies upon and sells the property so transferred to such directors cannot maintain a suit in equity to set aside such transfer. (*Butler v. Harrison Land etc. Co.*, 464.)

**19. CORPORATIONS—AUTHORITY OF THE PRESIDENT.**—The board of directors may invest the president with authority to act as chief executive officer of the corporation. This may be done either by express resolution or by acquiescence in a course of dealing. One dealing with the president in the usual manner and within the powers which the president has been accustomed to exercise, without the dissent of the stockholders, would be entitled to assume that he had actually been invested with those powers. (*Jones v. Williams*, 436.)

**20. CORPORATIONS—IMPLIED AUTHORITY OF AN OFFICER WHO HAS BEEN PERMITTED EXCLUSIVE CONTROL.**—The president of a corporation owning the greater part of its stock, and who has been permitted to control and manage its business as if it were his own private or personal affair, and who in its by-laws is granted control over the board of directors, must be deemed to have authority to act for the corporation, and to make any contract which it has authority to enter into. (*Jones v. Williams*, 436.)

**21. CORPORATIONS—DELEGATION OF AUTHORITY NOT FORBIDDEN BY PUBLIC POLICY OR THE LAW.**—A contract between a newspaper corporation and an individual by which the latter is given control of the paper for a number of years and made its manager and editor, is not against public policy, nor does it divest the corporation of its organic character or of the powers or obligations incident to its existence. (*Jones v. Williams*, 436.)

**22. CORPORATIONS—CONTRACT TO GIVE A PERSON AN OFFICIAL POSITION THEREIN.**—A contract by which a newspaper corporation sells a portion of its stock and stipulates to give the purchaser a position for five years, at a large salary, as editor and manager, and to make him president and a director, is not against public policy, where the object of the contract is the employment of the best expert talent which could be secured for the management of the corporate affairs, and its terms are such as to create an incentive on the part of such manager and editor to promote the welfare of the corporation and to make it successful. (*Jones v. Williams*, 436.)

**23. CORPORATIONS—DIRECTORS, POWER OF TO DELEGATE AUTHORITY.**—The power given by the statutes of Missouri to the directors of corporations to appoint such subordinate officers and agents as its business may require does not diminish their common-law power to delegate their authority. The directors represent the impersonal corporation completely in the business it is authorized to transact, and have power to do, or cause to be done, whatever they as individuals could do if the business were their own. (*Jones v. Williams*, 436.)

**24. CORPORATION—DELEGATION OF CORPORATE POWERS.**—Intrusting the president with the management of the entire business of a corporation is not a delegation of the corporate rights and powers, but is a mere authorization of the president to perform

for, and in the name of, the corporation, the business it is authorized to transact. (*Jones v. Williams*, 436.)

**25. CORPORATIONS—AUTHORITY OF OFFICER OR AGENT IMPLIED FROM USAGE.**—If an officer has been permitted to manage the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him. (*Jones v. Williams*, 436.)

**26. CORPORATION—AGENCY OF CHIEF STOCKHOLDER.**—Authority to represent and bind a corporation is not inferable from the fact that the person who assumes to do so owned a large majority of its stock and had the power to select and control its board of directors. (*Jones v. Williams*, 436.)

**27. CORPORATION—CONTRACT MADE IN THE NAME OF A NATURAL PERSON, WHEN BINDING UPON.**—If a contract is made in the name of the owner of the greater part of the stock of a newspaper corporation with another person, to employ the latter and to give him the control of the newspaper, such contract is binding upon the corporation, if it appears from the contract itself, or what was subsequently done under it, that both parties intended the corporation to be bound, and that he who acted on behalf of the corporation had authority to do so. (*Jones v. Williams*, 436.)

**28. CORPORATIONS—LIABILITY OF DIRECTORS.**—One who has acted as a director of a corporation, and participated in the management of its affairs, attending its meetings, and voting upon questions affecting its interests, before the certificate of its organization has been recorded as required by law, is estopped from enforcing against other directors a liability based exclusively upon their failure to record such certificate which he has failed to have recorded. (*Curtis v. Tracy*, 168.)

**29. CORPORATIONS—LIABILITIES OF DIRECTORS.**—A director of a corporation who takes part in meetings held before the recording of the final certificate of incorporation, at which additional security is voted to him for certain notes executed to him prior thereto and before he became a director, is estopped from holding the original directors liable upon the notes as partners on the ground that they exercised corporate functions before recording the certificate of incorporation. It was as much his duty as that of the original directors to see that such certificate was recorded, and he cannot enforce against them a penalty which he has incurred by his own conduct. (*Curtis v. Tracy*, 168.)

**30. CORPORATIONS—DIVIDEND—REMEDY WHERE RECORD IS SILENT.**—If the record of a corporation fails to show what it did, in the matter of declaring a dividend, the remedy is to bring an appropriate proceeding to correct the record itself. (*Dennis v. Joslin Mfg. Co.*, 805.)

**31. EVIDENCE—CORPORATIONS—VOTE OF DIVIDEND—PAROL PROOF OF.**—Parol evidence is inadmissible to show that a corporation voted a dividend as an offset to moneys withdrawn by some of its stockholders from the profits of the company, as the record should show what the corporation did. (*Dennis v. Joslin Mfg. Co.*, 805.)

**32. CORPORATIONS—DIVIDEND—VOTE OF, SHOULD APPEAR ON BOOKS.**—The declaration of a dividend, being one of the most important acts of a corporation, and implying a corporate disposition pro tanto of its property, ought to appear upon the books of the company. (*Dennis v. Joslin Mfg. Co.*, 805.)

**33. EVIDENCE OF VOTE OF CORPORATION—WHAT IS BEST.**—The best evidence of the vote of a corporation is the recorded action of its stockholders or officers. (*Dennis v. Joslin Mfg. Co.*, 805.)



**34. CORPORATIONS—BEQUEST TO WHEN VOID.**—Though a corporation is given power to take, hold, transfer, or convey for the purposes of its incorporation such property as may thereafter be devised or bequeathed to it, such devises and bequests are subject to the general statute declaring void devises or bequests to corporations made within two months prior to the death of the testator. (*Fairchild v. Edson*, 609.)

**35. JUDGMENT AGAINST CORPORATION, WHEN VOID.**—If service of process against a corporation is not made on any person having any connection with it, such service cannot support against collateral attack a judgment based thereon. (*Campbell etc. Mfg. Co. v. Marder, Luse & Co.*, 573.)

See Attachment, 3-5; Trusts, 17.

### COSTS.

**COSTS.—ON A BILL IN EQUITY** to compel a third party to pay to the mortgagee a fund arising from condemnation of the mortgaged property, and claimed by a judgment creditor of the mortgagor, such judgment creditor is liable for the costs if he unsuccessfully contests the right of the mortgagee to a decree. (*Keller v. Bading*, 159.)

### COTENANCY.

See Limitations of Actions, 2.

### COUNTIES.

See Checks, 4.

### COURTS.

See Jurisdiction.

### COURTS OF PROBATE.

See Judgment, 10.

### COVENANTS.

See Deeds, 6; Landlord and Tenant, 4, 5.

### DAMAGES.

**1. DAMAGES, MEASURE OF.**—In an action by a landowner to recover damages of a railway corporation for constructing and maintaining ditches so as to unnecessarily and negligently injure his land, he may recover for the destruction of his crops and trees, and the measure of his recovery for the damage to his land is the difference between its value immediately before and immediately after the debris was deposited thereon. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

**2. DAMAGES, MEASURE OF FOR DELAY IN SHIPPING MACHINERY.**—Though through the negligence of a carrier to whom steel boilers were delivered for transportation they were delayed ten days, it is not answerable for damages resulting from the mill of the plaintiff lying idle for want of such boilers, nor for expenditures for labor made in daily expectation that the boilers would arrive, where the carrier was not informed of the purpose for which the boilers had been ordered, nor of the loss likely to result from delay in their delivery. The carrier is, however, liable for expenditures made in telegraphing, and looking for the boilers, and for a team for hauling the expected boilers. (*Swift River Co. v. Fitchburg R. R. Co.*, 288.)

**3. DAMAGES, MEASURE OF FOR FAILURE TO DELIVER PROPERTY SOLD.**—Where a contract to deliver goods at a specified price is broken and the price is not paid before the time for delivery, the proper measure of damages is the difference between the contract price and the market price at the time the delivery should have been made. This rule is not applicable where the property contracted for is designed for a special purpose known to the seller and cannot be readily procured in the market. (*Laporte Imp. Co. v. Brock*, 245.)

**4. DAMAGES, MEASURE OF FOR NONDELIVERY OF BUILDING MATERIAL.**—Where one who contracts to furnish bricks to be used in the construction of buildings has failed to deliver them at the time specified, he is not answerable for loss of rents caused to the other contracting party from the consequent delay in completing the building, where there is no allegation that other bricks could not have been readily purchased in the market. (*Laporte Imp. Co. v. Brock*, 245.)

**5. TORTS—"INJURY" DEFINED—TRADE—WRONGFUL ACT—ACTION.**—Generally speaking, no one has a right intentionally to do an act with the intent to injure another in his business; but injury, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance. (*Macauley v. Tierney*, 770.)

**6. RESTRAINT OF TRADE—CONDUCT OF ONE'S OWN BUSINESS.**—Every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of the violation of contractual relations, are instances. (*Macauley v. Tierney*, 770.)

**7. EVIDENCE—BURDEN OF PROOF.**—If a railway company sued to recover damages alleged to have been suffered by the plaintiff from the negligent construction of ditches defends on the ground that such damages resulted from a storm so unprecedented as to constitute an act of God, the burden of proof is upon the corporation; but it is error for the court to instruct the jury that if the evidence is evenly balanced on this issue, they should find for the plaintiff, there being a general denial in the answer. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

See Carriers, 3, 4; Parent and Child; Railroads, 17; Statutes, 11.

## DEBTOR AND CREDITOR.

**DEBTOR AND CREDITOR.—ONE OBLIGOR CANNOT CHANGE HIS RELATION TO HIS CREDITOR** by any agreement with his joint obligor without the creditor's assent. (*National Cash Register Co. v. Brown*, 498.)

See Corporations, 12, 13.

## DECEIT.

See Fraud, 2.

## DEDICATION.

**1. DEDICATION—WHAT CONSTITUTES.**—If parts of a tract of land in a platted addition to a city are left without subdivision by the original owners and marked on the plat as "public ground,"

or, as "not to be occupied with buildings of any description," or, as "public ground—no buildings," this constitutes a dedication of such land in trust for the public. (*City of Chicago v. Ward*, 185.)

2. DEDICATION—RECLAMATION OF SUBMERGED SOIL.—If, after land is dedicated to a city as a public park, it becomes submerged with water, and the city reclaims it, it thereby reasserts its title thereto and holds the land subject to the terms of the dedication. (*City of Chicago v. Ward*, 185.)

3. DEDICATION—EFFECT WHEN FEE REMAINS IN OWNER.—Although the fee in land dedicated to the public is retained by the original owner, the land is charged with the same public rights and interests as if the fee were vested in the public. (*City of Chicago v. Ward*, 185.)

4. DEDICATION — UNAUTHORIZED USE — INJUNCTION.—After land has been dedicated for a public park and accepted by the city, it has no right to erect buildings thereon without the consent of the abutting property owners, in violation of the purpose for which the dedication was made; and such owners may enjoin the city from using the park for such purpose or for any other purpose not intended or prohibited by the terms of the dedication. (*City of Chicago v. Ward*, 185.)

5. DEDICATION—POWER OF LEGISLATURE.—After land has been dedicated to a city for a public park and accepted by the city, the legislature has no power to divert the property dedicated from the purpose for which it was donated. Such diversion would be an impairment of the vested rights of abutting property owners. (*City of Chicago v. Ward*, 185.)

6. DEDICATION—EFFECT OF CHANGE IN ABUTTING PROPERTY.—The dedication of land to a city for a public park and the vested rights of abutting owners arising therefrom are not affected by a change in the use of abutting buildings, so as to authorize the diversion of the property to another purpose than that intended by the dedication. (*City of Chicago v. Ward*, 185.)

7. DEDICATION—EVIDENCE TO SHOW OBJECT.—If nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted. (*City of Chicago v. Ward*, 185.)

## DEEDS.

1. DEEDS—DELIVERY.—A physical transfer of a deed from the grantor to the grantee is not absolutely essential to delivery. Other acts, accompanied with a clear intent to pass the title from one to the other are equally efficacious in establishing a delivery. (*Rodemeier v. Brown*, 176.)

2. DEEDS—DELIVERY.—If a grantee to whom an undelivered deed has been made has been in possession of the land conveyed for a number of years with a knowledge of the existence of the deed, and has paid all taxes, made valuable improvements, and conformed to the terms of the deed, and the grantor, when about to die, points to the deed and requests a bystander to deliver it to such grantee, this is a good delivery, although it is not actually delivered until after the grantor's death. (*Rodemeier v. Brown*, 176.)

3. DEEDS — DELIVERY — EQUITABLE ESTOPPEL. — If a father, upon executing a deed to his son, permits him to take possession of the land, pay taxes, make improvements, and pay a stipulated sum each year to the grantor as provided in the deed for a number of years, up to the time of the grantor's death, this constitutes an equitable estoppel against the other heirs to claim that there has been no delivery of the deed. (*Rodemeier v. Brown*, 176.)



**4. DEEDS — DELIVERY — PRESUMPTION.**—A stronger presumption prevails in favor of the delivery of a deed in case of a voluntary settlement than in an ordinary case of bargain and sale. (*Rodemeier v. Brown*, 176.)

**5. DEEDS — DELIVERY — VOLUNTARY SETTLEMENTS.**—In case of a voluntary settlement, the mere fact that the grantor retains the deed in his possession is not conclusive against its delivery, if there are no other circumstances besides the fact of his retaining it to show that it was not intended to be absolute. (*Rodemeier v. Brown*, 176.)

**6. A CONVEYANCE WITH COVENANTS OF WARRANTY OF REAL ESTATE SURREPTITIOUSLY AND ILLEGALLY CONNECTED WITH A PUBLIC SEWER** through a drain existing on the land of another private proprietor does not pass the right to the use of such sewer as appurtenant to the land conveyed, nor render the warrantor answerable for damages sustained by the fact that the grantee acquired no right to the continuance of the drain and sewer as they existed at the time of the conveyance. (*Bumstead v. Cook*, 293.)

See Execution, 5.

#### DEFINITIONS.

**"BY"—MEANING OF.**—When used to designate a terminal point of time, the word "by" means "not later than," and includes the night of a day "by" which a transaction must be completed to be binding. (*Elizabeth City etc. Mills v. Dunstan*, 654.)

"Appropriation of public moneys." (*State v. Moore*, 538.)

"Attached." (*Tefft v. Providence etc. Ins. Co.*, 761.)

"Conventional subrogation." (*Home Sav. Bank v. Bierstadt*, 146.)

"Injury." (*Macauley v. Tierney*, 770.)

"Intimidation." (*O'Neil v. Behanna*, 702.)

"Known veins." (*Casey v. Thieviege*, 511.)

"Legal subrogation." (*Home Sav. Bank v. Bierstadt*, 146.)

"Malice." (*Cravey v. State*, 833.)

"Malice aforethought." (*Cravey v. State*, 833.)

"Marriage." (*Hulett v. Carey*, 419.)

"Obligation of a contract." (*Swinburne v. Mills*, 932.)

"Public officer." (*Attorney General v. Drohan*, 301.)

"Seduction." (*McCullar v. State*, 847.)

"Solvency." (*Baily v. Hornthal*, 645.)

"To repair." (*Wattles v. South Omaha etc. Co.*, 554.)

"Trademark." (*Cady v. Schultz*, 763.)

"Tradename." (*Cady v. Schultz*, 763.)

"Watercraft." (*Bartlett v. Steam Dredge*, 314.)

#### DELEGATION OF POWERS.

See Corporations, 21, 23, 24; Municipal Corporations, 2.

#### DELIVERY.

See Deeds, 1-5; Sales, 2, 3.

#### DEPOSITIONS.

**DEPOSITION — PRESUMPTION THAT WITNESS REMAINS OUT OF THE STATE.**—When it is shown that a witness resides out of the state when his deposition was taken, and there is nothing to indicate his return, his deposition may be received at the trial six months later. There is no presumption that he has, in the mean time, ceased to be a resident of the state wherein his deposition

was taken and become a resident of the state where the trial takes place. (*Kaufman v. Caughman*, 808.)

See Constitutions, 3.

#### DIVIDENDS.

See Corporations, 30-32.

#### DOWER.

**1. DOWER, RELEASE FROM RENUNCIATION OF.**—One who purchases a mortgage to relieve a wife who joined therein from her renunciation of dower, but who presents it in a suit to foreclose prior mortgages, informing no one of his intended release, and who executes no release in writing, cannot be regarded as releasing such wife, and a sale in such foreclosure proceedings carries her right of dower, though the proceeds are not sufficient to pay any part of the mortgage so purchased, and the other mortgages were not executed by the wife. (*Miller v. Farmers' Bank*, 821.)

**2. DOWER—ENCUMBRANCES EXISTING BEFORE MARRIAGE.**—If, prior to a man's marriage, he has executed encumbrances against his real property under which a subsequent judicial sale is made, his wife is bound by such sale, and whatever rights she has in the property are transferred to the surplus proceeds after the payment of such encumbrances. (*Miller v. Farmers' Bank*, 821.)

**3. DOWER—ENCUMBRANCES EXECUTED BY A HUSBAND.** If, after his marriage, a husband executed encumbrances upon his real property, his wife's right of dower is not affected thereby. If a judicial sale be made thereunder, realizing more than sufficient to satisfy the encumbrances, she has no interest in the residue, but after his death she can have dower assigned her in the land itself. (*Miller v. Farmers' Bank*, 821.)

**4. DOWER—JOINDER OF WIFE IN ENCUMBRANCES.**—If, during coverture, a husband executes a mortgage upon which his wife renounces dower, and the mortgage is foreclosed during coverture, she is by her act deprived of her right to claim dower in the land so mortgaged. (*Miller v. Farmers' Bank*, 821.)

**5. DOWER—FORECLOSURE WITHOUT MAKING A WIFE A PARTY.**—If a wife has joined in a mortgage executed by her husband, thereby renouncing her dower, she is not a necessary party to a suit to foreclose such mortgage, and after his death has no right to dower in the land. (*Miller v. Farmers' Bank*, 821.)

**6. DOWER—FORECLOSURE OF SEVERAL MORTGAGES IN SOME OF WHICH THE WIFE DID NOT JOIN.**—If several mortgages are foreclosed in the same suit, in one only of which the wife joined, she is not, after the death of her husband, entitled to relief as against the purchaser on the ground that her renunciation of dower applied to one mortgage only. The purchaser is regarded as succeeding to the right of the mortgagor, although the proceeds of the sale were not sufficient to satisfy the mortgages in which she did not join, and the mortgagor in whose favor she renounced received nothing. (*Miller v. Farmers' Bank*, 821.)

#### EASEMENT.

##### EASEMENT, WHEN DOES NOT PASS BY IMPLICATION.

An easement not expressly described in a conveyance must actually belong to the estate conveyed in order to pass by implication. (*Bumstead v. Cook*, 293.)

See Waters, 4.

**ELECTION OF COURTS.**

See Homestead, 1.

**ELECTIONS.**

**ELECTION, ACTION OF OFFICERS, WHEN FINAL.**—If a statute provides for an election of members of a committee of a political party and for proceedings by the election commissioners for a recount, and declares that such commissioners have authority to recount the ballots cast and determine the questions raised, and that such recount shall stand as the true result of the vote cast, the declaration of the commissioners of the result of the recount is final and conclusive, and cannot be disregarded by the members of such committee. (*Attorney General v. Drohan*, 301.)

**EMINENT DOMAIN.**

See Nuisance, 2, 3.

**ENGINEERS' LICENSES.**

See Municipal Corporations, 6.

**EQUITY.**

**1. JUDGMENT, PERSONAL, IN SUIT IN EQUITY.**—A court of equity may adapt itself to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff or give him a personal judgment therefor, to be enforceable by execution. In a suit against members of a partnership and a retiring member thereof to subject to execution property fraudulently withdrawn by the latter, the court may enter personal judgment against him. (*Baily v. Hornthal*, 645.)

**2. MORTGAGES — CONDEMNATION PROCEEDINGS — BILL TO COMPEL APPLICATION OF FUND.**—If a fund derived from the condemnation of mortgaged property is in the hand of a third party, who refuses to pay it to either of the parties to the mortgage, for the reason that it is claimed by a judgment creditor of the mortgagor, a court of equity will entertain a bill to determine the rights of the parties and order the fund paid over. (*Keller v. Bading*, 159.) See Attachment, 2; Conspiracy, 3; Corporations, 18; Costs; Injunction; Judgment; Prohibition.

**ESTATES.**

See Wills, 9, 10.

**ESTOPPEL.**

**ESTOPPEL—RECEIPT IN FULL AS.**—A daughter who executes a receipt "in full" for money advanced by her father as her portion of his estate is estopped from claiming any further portion thereof. (*Rodemeier v. Brown*, 176.)

See Assignment for Benefit of Creditors; Corporations, 28, 29; Deeds, 3; Execution, 1; Fixtures; Insurance, 23.

**EVIDENCE.**

**1. THE PRESUMPTION IS THAT EVERY ONE ACTING OFFICIALLY** does his duty. (*State v. Main*, 30.)

**2. JUDICIAL NOTICE TAKES THE PLACE OF PROOF** and is of equal force. In its proper field it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. (*State v. Main*, 30.)



3. JUDICIAL NOTICE MAY BE TAKEN of the fact that a disease exists among trees, known as "the yellows," ordinarily resulting in the premature death of the trees affected. (*State v. Main*, 30.)

4. EVIDENCE—JUDICIAL KNOWLEDGE—BRASS KNUCKLES.—A court takes judicial notice of the fact that the weapon known as "brass knuckles" may be made of any metal or hard substance as well as of brass. (*Louis v. State*, 832.)

5. EVIDENCE—HABITS OF ANIMALS.—It is competent to prove that a dog has the habit of attacking passing teams, in support of a disputed allegation that it did attack a passing team on a particular occasion. (*Broderick v. Higginson*, 296.)

6. EVIDENCE, HEARSAY.—STATEMENTS MADE BY A PROSECUTRIX the next morning after her receiving a whipping, telling who whipped her, are hearsay, and therefore inadmissible. (*State v. Rice*, 816.)

7. EVIDENCE.—POST MORTEM INQUISITIONS made under the authority of the coroner are admissible in evidence. (*Grand Lodge I. O. M. A. v. Wieting*, 123.)

8. EVIDENCE, STENOGRAPHIC NOTES, READING FROM.—An official reporter who has taken stenographic notes of the testimony of a witness given at a former trial may be permitted to testify therefrom what the testimony of the witness was, though he has no recollection upon the subject and must depend entirely upon his notes. (*State v. Smith*, 219.)

9. EVIDENCE—LETTERS EXHIBITED TO A DECEDENT.—If a letter is written by a woman in the presence of a man and handed to him to read, and he does read it, puts it into an envelope, and seals it, with the apparent purpose of mailing it, and it is subsequently mailed, and contains a statement to the effect that they are married, it is admissible in evidence as being in effect the joint declaration or statement of both parties. (*Hulett v. Carey*, 419.)

10. EVIDENCE, SECONDARY—INSTRUMENT BEYOND JURISDICTION.—If a cablegram is without the jurisdiction of the court, and an unsuccessful effort has been made to obtain it, parol evidence is admissible to show the nature of the instrument. (*People v. Seaman*, 326.)

11. EVIDENCE—ADMISSIBILITY—FALSITY OF DEATH CERTIFICATE.—In a prosecution for manslaughter, in procuring an abortion, evidence that, after the woman's death, a registered letter, containing a money order, payable to her order, was delivered to the one who had cared for her, that the defendant indorsed the order in her name, and that the money was obtained thereon, is admissible to prove the known falsity of the death certificate, afterward issued by the defendant, and in which the deceased was given another name. (*People v. Seaman*, 326.)

12. EVIDENCE TO IMPEACH MINUTES OF A PUBLIC BOARD.—The records of a public board cannot be collaterally impeached. Hence, if a copy of the records of a state board of agriculture, duly certified by its secretary, is received in evidence, it cannot be met and overcome by oral testimony of such secretary that the statements relied upon in such minutes had been interlined pending the prosecution, and were not any part of the original record. (*State v. Main*, 30.)

13. EVIDENCE.—THE DOCKET OF A TRIAL JUSTICE is, in South Carolina, the highest and best evidence of proceedings before him in a criminal cause. It is, therefore, error to reject such docket on the ground that the warrant and other papers in the cause must be produced, or their loss proved. (*State v. Rice*, 816.)

14. EVIDENCE OF OTHER LIKE CRIMES.—IF A FELONIOUS INTENT is an essential ingredient of the crime charged, and the

act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. (*People v. Seaman*, 326.)

15. EVIDENCE OF OTHER LIKE OFFENSES.—If it is necessary to show a particular intent in order to establish the offense charged, evidence of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent. (*People v. Seaman*, 326.)

16. EVIDENCE—EXTRANEOUS CRIMES—INSTRUCTIONS.—If proof of an extraneous crime is admitted in a criminal case, and the effect of such evidence has a tendency or might bring about a conviction for the extraneous crime, or to injure the rights of the accused in the case on trial then, and then only, must the court restrict the effect of such evidence in the charge to the jury. (*Thornley v. State*, 836.)

17. EVIDENCE—DECLARATIONS IN FAVOR OF THE PARTY MAKING THEM.—If a man executes an instrument in writing and is described therein or in the certificate of acknowledgment thereof as an unmarried man, such writing or acknowledgment is not admissible after his death against one claiming to be his widow for the purpose of proving that he was unmarried. (*Hulett v. Carey*, 419.)

18. EVIDENCE IN CRIMINAL CASES—REPRODUCTION OF TESTIMONY OF DEAD WITNESS.—The testimony of a witness who has since died, taken and reduced to writing at the preliminary examination in a criminal case, cannot be used as evidence against the accused upon the main trial. Such testimony is not a "deposition" allowed by statute to be read in evidence in criminal cases, for the reason that the requisites of, and formalities prescribed for, the taking of such depositions are not the same as those required in taking the testimony in preliminary examinations. (*Cline v. State*, 850.)

See, Agency, 1; Bills of Lading, 2, 3; Carriers, 8; Checks, 5; Concealed Weapons; Conspiracy, 2; Constitution, 5; Corporations, 31, 33; Dedication, 17; Forgery, 5, 6; Homicide, 2; Husband and Wife, 1; Insolvency, 2; Insurance, 10; Physicians and Surgeons; Process, 4; Seduction, 4; Trusts, 16.

## EXECUTIONS.

1. EXECUTIONS—SALES—ESTOPPEL AGAINST OFFICER. A sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold was not the defendant's, nor liable to such levy and sale. (*McCarthy v. O'Marr*, 502.)

2. EXECUTIONS—SALES—OFFICERS' RIGHT TO RETURN PROPERTY SOLD TO ITS OWNER.—An officer, who, under an execution against a certain named person, sells property found in his possession and held under an attachment against him, but belonging to a third person, and who, upon discovering such fact after the sale, returns the money to the purchaser and the property to its real owner, and makes his return upon the execution in accordance with the facts, is not liable to the judgment creditor for the amount thus realized at the sale. (*McCarthy v. O'Marr*, 502.)

3. EXECUTION, SALE UNDER AFTER THE RETURN DAY. Where a levy is made upon real property before the return day of

an execution, the sheriff may make a sale after such day. (*Bradley v. Sandilands*, 386.)

4. PUBLIC OFFICERS—THE PRESUMPTION IS, that a sheriff having an execution did his duty in reference thereto. Hence, though the execution bears an indorsement of filing by the clerk of the court, it will be presumed not to have been returned at that time, if it was the duty of the sheriff to retain it and to thereafter make a sale thereunder. (*Bradley v. Sandilands*, 386.)

5. CONVEYANCE OF REAL PROPERTY—SHERIFF'S DEED—DESCRIPTION.—A mortgage, decree of foreclosure, and sheriff's deed describing property as all the property, real, personal, and mixed, now owned or hereafter to be acquired by a mortgagor railway corporation, do not pass the title to a lot of land belonging to the corporation situated at a considerable distance from its road and not connected with or used in its operation. (*National Bank of Commerce v. Lock*, 923.)

See Attachment, 3; Municipal Corporations, 8.

### EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—PRIMARY FUND FOR PAYMENT OF DEBT SECURED BY MORTGAGE.—The general rule, as between the real and personal representatives, is, that the personalty is the primary fund for the payment of debts. This rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased, but extends only to encumbrances created by the deceased himself. If the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt, and, on his death, passes to his devisee or heir at law, subject to the encumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt. (*Hunt, Petitioner*, 743.)

2. EXECUTORS AND ADMINISTRATORS—PAYMENT OF MORTGAGE OUT OF PERSONAL ESTATE—WHEN NOT JUSTIFIED.—If one buys an estate subject to a mortgage, and in his deed assumes the payment of the mortgage note, it is equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt, but does not show an intention to make the mortgage debt, as between his real and personal representatives, his personal debt; and, if the mortgagee subsequently transfers the mortgage to a bank, the consideration for the transfer being a written guaranty of payment of the mortgage note, signed on its back by the purchaser of the estate, such guaranty does not show an intention to make the mortgage debt, as between the purchaser's real and personal representatives, his personal debt, as it is merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remains after the guaranty precisely as before. The purchaser's administrator is not, therefore, charged with the payment of the mortgage debt, and he is not justified in paying it out of the personal estate coming into his hands. (*Hunt, Petitioner*, 743.)

3. JUDGMENT AGAINST ADMINISTRATOR, WHEN BINDING UPON HEIRS.—A judgment in a suit by an administrator of a deceased partner against a surviving partner fixing the amount due from the latter to the former upon a settlement of the partnership affairs is conclusive against the heirs of such deceased partner in any subsequent proceedings between them and the surviving partner or his successor in interest. (*Darrow v. Calkins*, 637.)

See Insurance, 13; Judgment, 5, 6, 10; Wills, 11.



**EXEMPTIONS.**

See Homestead, 4; Liens, 1, 2.

**EXPECTANCIES.**

**1. ASSIGNMENT OF EXPECTANT INTEREST.**—A conveyance or assignment of something which the assignor does not own and may never own is not operative at law, and to be operative in equity, must be founded upon a valuable, not merely a good, consideration. (Lennig's Estate, 725.)

**2. ASSIGNMENT OF EXPECTANT INTEREST UNDER WILL.**—An assignment of an expectant interest under a will, not based upon any consideration and made during the testator's lifetime, cannot be enforced against the assignor, after the testator's death. Such assignment cannot be sustained, either as a gift, nor as a family settlement, in the absence of any dispute as to any claim of interest or title which the grantee has or might have in the estate of the testator, nor does the fact that such grantee abstained from efforts to obtain a codical to such will, create a sufficient consideration to support the instrument as an equitable assignment. (Lennig's Estate, 725.)

**EXPRESS COMPANIES.**

**EXPRESS COMPANIES—DELIVERY—FIXED LIMITS—DISCRIMINATION.**—If an express company has, in apparent good faith, and with regard to public requirements, assumed to fix limits in a city beyond which it will not call for or deliver packages, it is not bound, as to one who has dealt with it, and who has knowledge of the limits established, to go beyond such limits to receive goods for shipment, or to deliver packages, even where the established limits extend, in some directions, a greater distance from the express office than it is to the plaintiff's place of business. (Bullard v. American Express Co., 358.)

**FELLOW-SERVANTS.**

See Railroads, 12.

**FINES.**

See Constitutions, 6.

**FISHERIES.**

**1. FISHERIES—PARAMOUNT RIGHTS.**—The public right of fishery is paramount to the private right to cut grass or sedge. (Allen v. Allen, 738.)

**2. FISHERIES—RIGHT TO TAKE SHELLFISH ON SHORES OF TIDE WATER.**—Shell fisheries are public rights, and, in the absence of an express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time, though he finds it necessary, in doing so, to dig up the grass or sedge. (Allen v. Allen, 738.)

**FIXTURES.**

**1. FIXTURES.—MANURE** made on a farm in the usual course of husbandry will pass as incident or appurtenant to the realty under a deed of the whole farm, but it does not pass upon a sale of only a small part of the land, though it happens to be piled upon that part. The rule, as applied to an entire farm, is one of policy, to promote the interests of agriculture, but it has no application when the sale is not of the farm, but only of a small part thereof. (Collier v. Jenks, 741.)

**2. FIXTURES, WHAT ARE NOT.**—Band saw machines, a door clamp, a wood-frame sash clamp, an iron top saw machine, all resting on the floor by their own weight, forming a part of an entire plant and placed in a building with intent to be made a permanent part thereof are not, as between mortgagor and mortgagee, fixtures, because they are not attached to the building or land. (*Shepard v. Blossom*, 431.)

**3. FIXTURES, WHAT ARE—PONDEROUS MACHINES.**—A polishing machine weighing three and a half tons resting on a platform by its own weight and having underneath it, for the purpose of sustaining it, two six-inch posts, reaching from the floor upon which it rests to the first floor of the building, and a large iron veneer press machine, weighing four tons, resting on the floor by its own weight, are, as between mortgagor and mortgagee, fixtures. Ponderous articles, although annexed to the land only by the force of gravitation, if placed there with manifest intent that they shall permanently remain, may be fixtures. (*Shepard v. Blossom*, 431.)

**4. FIXTURES.—MACHINES, THOUGH NOT PONDEROUS,** which are blocked to the floor, or held by a countershaft, or braced in front and rear, or braced on one side, as they have some sort of physical annexation, must be treated as fixtures, as between a mortgagor and a mortgagee, where they are placed in a building with intention of making them a permanent part of the plant therein contained. (*Shepard v. Blossom*, 431.)

**5. FIXTURES, NECESSITY OF ATTACHING TO BUILDING.** Though buildings are constructed for the purpose of using machinery therein, and such machinery is placed therein with the intention of making it a permanent part of the plant, it does not become a part of the realty unless it is actually or constructively attached to the building or land. (*Shepard v. Blossom*, 431.)

**6. FIXTURES—WAIVER BY TENANT OF RIGHT TO REMOVE.**—If, at the expiration of a lease, during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease cannot be removed by the tenant during or at the end of the new lease, although his actual possession of the premises has been continuous. (*Sanitary Dist. of Chicago v. Cook*, 161.)

**7. FIXTURES—ESTOPPEL.**—An admission by the attorney for a landlord that the latter does not intend to claim fixtures on the leased premises does not estop him from claiming them, if such admission is withdrawn before it is acted upon, and the ownership of the fixtures is thereafter treated as a disputed question by all of the parties. (*Sanitary Dist. of Chicago v. Cook*, 161.)

## FORGERY.

**1. FORGERY—STATUTORY INSTRUMENTS.**—If the statute authorizes an instrument not known to the common law, and so prescribes its form as to make any other form void, forgery cannot be committed by making an instrument in a form not provided by the statute, although it is so like the genuine as to be likely to deceive most persons. (*Caffey v. State*, 841.)

**2. FORGERY—WHAT SUBJECT OF.**—An instrument, to be the subject of forgery, must, on the face of it, be good and valid for the purpose for which it is created. If void or invalid on its face, it cannot be good by averment, and forgery cannot be predicated upon it. (*Caffey v. State*, 841.)

**3. FORGERY—INCOMPLETE INSTRUMENT.**—If the statute provides that a check in payment of the wages of a school teacher "shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as teacher," an indictment for the forgery of such a check, which fails to set out the affidavit of the teacher, and to allege that such affidavit accompanied the check is fatally defective. (*Caffey v. State*, 841.)

**4. FORGERY—INCOMPLETE INSTRUMENT.**—If the statute requires that a check in payment of a teacher's wages shall be accompanied by his affidavit, showing that he is entitled to the amount of the check for compensation as teacher, such check without such affidavit is an incomplete instrument, not in the form provided by the statute, invalid on its face, and forgery cannot be predicated upon it. (*Caffey v. State*, 841.)

**5. FORGERY—INDICTMENT—SECONDARY EVIDENCE.**—If an indictment for uttering a forged instrument sets out only its substance, and alleges that it is lost or destroyed, or that it is in the possession of the accused and not within the reach of the process of the court, this is sufficient notice to the accused to produce the instrument, and his failure to do so is sufficient to admit secondary evidence of its contents. (*Thornley v. State*, 836.)

**6. FORGERY—EVIDENCE—CHARGE LIMITING EFFECT OF.**—If, on a trial for uttering a forged instrument, evidence is admitted to show that the accused had another alleged forged instrument in his possession, the duty then devolves upon the court to limit and restrict by instructions the purposes for which alone the jury may consider such evidence, and the failure of the court to so instruct is fatal error, although the charge is not excepted to for such omission. (*Thornley v. State*, 836.)

## FORMER JEOPARDY.

**FORMER JEOPARDY—IMPROPER DISCHARGE OF JURY FOR SICKNESS OF JUROR ENTITLES PRISONER TO DISCHARGE.**—It is improper, during the trial of a criminal case, for the trial judge to discharge the jury upon being notified by an officer in attendance upon the court that the latter has received information, by telephone, that a juror is sick and unable to proceed with the trial, particularly where the defendant objects and requests a continuance until the next day, so that the real physical condition of the juror can be ascertained. There being no legal evidence of the sickness of the juror, there is no established fact upon which the court can exercise discretion in the matter; and the defendant, having been once placed in jeopardy, cannot, therefore, be tried again for the same offense, but is entitled to a discharge. (*State v. Nelson*, 780.)

## FRANCHISE.

See *Waters*, 4.

## FRAUD.

**1. FRAUD MAY, IN SOME CASES, BE INFERRED** from the facts, but not unless it is charged, and then only when the facts and circumstances clearly indicate that fraud has been committed. (*Bartholomew v. Derby Rubber Co.*, 57.)

**2. FRAUD—DECEIT—BUYING ON CREDIT.**—The act of buying goods on credit, intending not to pay for them, is a good basis for an action of deceit, for there is an implied representation by the purchaser of an intention to pay. (*Swift v. Rounds*, 791.)

See *Partnership*, 8; *Sales*, 5, 8.



**GARNISHMENT.**

**See Attachment; Municipal Corporations, 8.**

**GIFTS.**

**1. THE GIFT OF A DEPOSIT IN BANK** is inchoate and revoked by the donor's death, if it was sought to be made by an order directed to the bank to transfer all moneys due the donor to B. M., to be drawn during his life, and after his death to be divided equally among A. B. and C., and the evidence shows that though the order and the bank-book were delivered to B. M., it fails to show that he received them on behalf of the others, or that the bank ever had any notice or knowledge during the life of the donor that the order had been drawn, or that anyone except the donor claimed any interest in the deposit. (*McNamara v. McDonald*, 48.)

**2. GIFT OF A DEPOSIT IN A SAVINGS BANK, WHEN ACCOMPLISHED.**—If a depositor in a savings bank executes and delivers a written order properly addressed to it, and of which it receives due notice, for the transfer of the deposit on its books to the plaintiffs, subject to the right of M. to draw from it so much, if any, as shall be found necessary for his proper support, and delivers the pass-book to him to be delivered to the plaintiffs at his death, and they accept the gift, and he drew nothing out for his support, but drew a sum with a view of defrauding plaintiffs and giving it to the defendant, a party to the fraud, who, after the death of M., refused to return the sum so received, the plaintiffs are entitled to recover the amount thereof. (*McNamara v. McDonald*, 48.)

**GUARANTY.**

**GUARANTY—WITHDRAWAL FROM.**—One who signs a "continuing guaranty" for the faithful performance of duty by an agent may withdraw therefrom at any time by giving notice to the principal, and is not liable for any default on the part of such agent in matters intrusted to him after such notice has been given and received. (*Singer Mfg. Co. v. Draughan*, 657.)

**GUARDIAN AND WARD.**

**See Insane Persons, 3, 4.**

**HEAD OF FAMILY.**

**See Homestead, 1.**

**HEIRS.**

**See Executors and Administrators, 3.**

**HOMESTEAD.**

**1. HOMESTEADS—HEAD OF FAMILY.**—A husband who lives with his family remains the "head" thereof, although he fails to support such family, quarrels with his wife, and occupies a separate bed. Such treatment on his part, coupled with the fact that the wife supports the family, does not make her the "head" thereof, within the meaning of that word as used in homestead laws. (*Barry v. Western Assurance Co.*, 530.)

**2. HOMESTEADS IN PUBLIC LANDS.**—A homestead may be claimed in public lands belonging to the United States. (*Watterson v. E. L. Bonner Co.*, 527.)

**3. HOMESTEADS.—AN ABANDONED WIFE MAY CLAIM a homestead exemption.** (*Watterson v. E. L. Bonner Co.*, 527.)

**4. HOMESTEADS—EXEMPTION OF IMPROVEMENTS.**—All outbuildings, fences, and other improvements constitute part of the homestead, and cannot be sold under legal process, unless, taken all together, they exceed in value the amount exempted to the homesteader. (*Watterson v. E. L. Bonner Co.*, 527.)

**5 HOMESTEADS—MORTGAGES OF.—ABANDONMENT** of a homestead does not retract so as to give validity to a mortgage thereof void at the time of its execution. (*American Savings etc. Assn. v. Burghardt*, 507.)

**6. HOMESTEADS—MORTGAGE OF NOT SIGNED BY WIFE.** A mortgage of a homestead not signed by the wife is void, whether it is made on chattel or real property. (*Watterson v. E. L. Bonner Co.*, 527.)

**7. HOMESTEAD—MORTGAGE OF—ACKNOWLEDGMENT BY WIFE.**—Under a statute making a mortgage of a homestead void unless the wife joins in the execution thereof, the acknowledgment by the wife is an essential part of the execution of the mortgage, and, if substantially defective, the mortgage is void. (*American Savings etc. Assn. v. Burghardt*, 507.)

## HOMICIDE.

**1. HOMICIDE—ABORTION—ELECTION OF COUNTS.**—If an information for manslaughter, in procuring an abortion, contains three counts, the first, charging the use of drugs, the second, the use of an instrument, and the third, the employment of means unknown, the court does not err in not compelling the prosecution to elect upon which count it relies, where such election is made upon the submission of the case to the jury. (*People v. Seaman*, 326.)

**2. HOMICIDE — ABORTION — EVIDENCE OF GUILTY KNOWLEDGE AND INTENT.**—If it becomes necessary, in a prosecution for manslaughter, in procuring an abortion, to show defendant's guilty knowledge and intent, owing to the theory of the defense that the premature birth was due to accidental causes, and that death resulted from natural causes, it may be done by proof that the defendant had produced other abortions in the same house. (*People v. Seaman*, 326.)

**3. HOMICIDE—ABORTION—PROPER INSTRUCTIONS.**—In a prosecution for manslaughter, in procuring an abortion, it is error to refuse to instruct the jury that, if they believe the deceased aborted from natural causes, or from any one of the several causes testified to by medical witnesses in the case, or by reason of the ordinary sickness and vomiting, augmented by the sickness and vomiting of a sea voyage, together with the nervous mental excitement, fatigue, lack of nourishment, and the change of climate, they should find the defendant not guilty, especially where there is evidence to support the theory that death resulted from natural causes. (*People v. Seaman*, 326.)

**4. HOMICIDE — ABORTION — IMPROPER INSTRUCTIONS.**—In a prosecution for manslaughter, in procuring an abortion, it is reversible error, where the defense relies upon the testimony of expert witnesses to show that death resulted from natural causes, to instruct the jury that such testimony is exposed to a reasonable degree of suspicion, and that, in giving too much weight thereto, juries have, in many cases, been induced to render unwarrantable verdicts. (*People v. Seaman*, 326.)

**5. MURDER — INDICTMENT — MALICE AFORETHOUGHT.**—Under a statute defining murder as a killing with "malice aforethought," the indictment must charge the crime in the words of the statute or it is fatally defective. (*Cravey v. State*, 833.)

**6. MURDER—INDICTMENT.—MALICE AFORETHOUGHT** is essential to murder in both its degrees; and an indictment for murder alleging that the killing was done with "implied malice," but omitting to add the word "aforethought," is fatally defective. (*Cravey v. State*, 833.)

**7. MALICE AND MALICE AFORETHOUGHT — DIFFERENCE.**—The meaning of "malice" and "malice aforethought" is not precisely the same. Malice aforethought indicates a greater degree of wickedness than malice simply. (*Cravey v. State*, 833.)

### HUSBAND AND WIFE.

**1. HUSBAND AND WIFE, ADMISSION OF ONE AS EVIDENCE AGAINST THE OTHER.**—In an action by a husband and wife to recover for personal injuries suffered by them, an admission made by the husband out of the presence of his wife may be admitted in evidence against him, but the jury must be charged that such admission cannot be considered in the case against her. (*Broderrick v. Higginson*, 296.)

**2. MARRIED WOMEN—PAROL TRUST AGAINST—EQUITABLE LIEN.**—A transaction by which a husband and wife contract for the purchase of a lot, the deed to which is made to the wife, and by agreement deposited with a third person as collateral security for a loan made by him to be used in building a house on such lot, and for which she subsequently gives her note, constitutes a parol trust in favor of the party making the loan to the extent of his debt, which he may enforce in equity by having it declared a lien upon the land, and the land sold for the satisfaction thereof. The wife is not entitled to the delivery of the deed until such loan is paid. (*First Nat. Bank v. Fries*, 663.)

See Dower; Homestead, 1, 6, 7.

### INDICTMENT.

**1. INDICTMENT—MISNOMER OF CRIME.**—An error in designating the name of a crime in the commencement of an indictment is an irregularity merely, and the indictment must, nevertheless, be deemed sufficient if the charging part states a public offense. (*State v. Howard*, 403.)

**2. INDICTMENT, WHEN NOT SUFFICIENT THOUGH IT FOLLOWS THE LANGUAGE OF THE STATUTE.**—If a statute upon which an indictment is based defines the crime by its legal result, and does not contain all the essential elements of the crime, an indictment in the language of the statute is not sufficient. (*State v. Howard*, 403.)

See Bribery; Forgery, 5; Homicide, 5.

### INJUNCTION.

**1. INJUNCTION TO PROTECT A DE FACTO OFFICER IN THE POSSESSION OF AN OFFICE.**—A court of equity has jurisdiction to protect a de facto officer in the possession of an office from intrusion by one claiming the office de jure. The court is not divested of its jurisdiction by allegations in the pleadings tending to put in issue the title to the office, if they are meant, and acted upon by the court, merely as explanatory of his de facto right to the possession of the office. (*State v. Superior Court*, 893.)

**2. INJUNCTION—IRREPARABLE INJURY.**—Where the complainant had purchased an interest in a newspaper corporation and entered into an agreement with it by which he was to have the sole management and control for five years, and the board of directors



threatened to take from him such management and control, the injury thus threatened cannot be adequately compensated by an award of damages, and must, therefore, be treated as irreparable. (*Jones v. Williams*, 436.)

3. **A MANDATORY INJUNCTION** should issue against the maintenance by the defendant of a building in so far as it projects over the lands of the plaintiff, nor is it any defense to a suit for an injunction that the land of the plaintiff beneath such projection is a driveway, and he therefore has not yet suffered any injury from the projection. (*Harrington v. McCarthy*, 298.)

4. **LACHES WHERE A MANDATORY INJUNCTION IS SOUGHT.**—One who calls attention when the foundation stones of a building are laid to the fact that he believes the wall will project over his land and who brings suit before the building is completed to compel the removal of so much of it as projects over his land, cannot be refused relief on the ground that he has been guilty of laches. (*Harrington v. McCarthy*, 298.)

5. **INJUNCTION, MANDATORY, WHEN MAY BE REFUSED.** If, in laying the foundation wall of a building, a corner stone projects a short distance beyond the builder's line and below the surface of the ground, but such encroachment was unintentional and very slight and compensation was offered therefor, a mandatory injunction will not issue at the request of the owner of the adjacent land to compel the removal of this encroachment, where no appreciable damage has resulted to him, and such removal might be difficult and expensive. The plaintiff will be left to his remedy at law. (*Harrington v. McCarthy*, 298.)

6. **INJUNCTION—AGAINST PROCEEDINGS IN ANOTHER STATE.**—A creditor in one state who recognizes the validity of an assignment for the benefit of creditors made by a resident of that state, by appearing before the assignee and presenting his claim, may be enjoined by the courts of that state from bringing an action in another state, and there attaching lands, on the ground that such lands did not pass by the assignment for the reason that it does not conform to the laws of the latter state. (*Kendall v. McClure Coke Co.*, 688.)

7. **RESTRAINT OF TRADE—NOTICES AS TO BESTOWAL OF PATRONAGE—INJUNCTION.**—The sending of notices, by the members of an association of master plumbers, who have agreed among themselves not to deal with wholesalers who sell plumbers' supplies to those not members of the association, to such wholesalers, not to make such sales under the penalty of the withdrawal of the patronage of the members of the association in case of a failure of the wholesalers to comply, is no ground for an injunction, although the nonmembers are, in consequence of such notices, unable to purchase supplies from wholesale dealers in this and other states, and although such notices are prompted by a selfish desire on the part of such members to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. Their desire to free themselves from that competition is a legal excuse for sending the notices. (*Macauley v. Tierney*, 770.)

See Dedication, 4; Prohibition; Trademarks, 2, 4.)

## INSANE PERSONS.

1. **APPEAL—WRIT OF ERROR BY NEXT FRIEND OF INSANE DEFENDANT.**—An insane person may, by his next friend, maintain a writ of error for the purpose of questioning the regularity and legality of a decree of divorce entered against him in a proceeding instituted after he became insane. (*Iago v. Iago*, 120.)

**2. INSANE PERSONS, PROCEEDINGS FOR COMMITMENT OF.**—A statute providing for the commitment of a person to an insane asylum, though without any notice to him, is not in conflict with the declaration of rights nor with the fourteenth amendment to the constitution of the United States, if it makes provision for his subsequent discharge by two trustees of the asylum, or upon judicial proceedings before a justice of the supreme court, upon the written application of any person, if it appears that the person so in custody is not insane nor dangerous to himself or others, and that he ought not to be longer confined. (Dowdell, Petitioner, 290.)

**3. GUARDIAN AND WARD—LUNATICS.**—The appointment of a guardian for a lunatic is valid until the proceeding under which it is made is reversed. (Sims v. Sims, 665.)

**4. INSANE PERSONS—GUARDIAN OF—REMOVAL.**—Ex parte proceedings to have a lunatic declared sane, brought without notice to his guardian, are void, as well as an order made therein removing such guardian without notice. (Sims v. Sims, 665.)

**5. EVIDENCE—INSANITY—SELF-DESTRUCTION.**—While there is no presumption of law that self-destruction arises from insanity, yet the fact of self-destruction, the manner and mode thereof, and all the attending circumstances, may be considered in determining the question of the insanity of the deceased. (Grand Lodge I. O. M. A. v. Wieting, 123.)

See Appeal, 10; Insurance, 27; Marriage and Divorce, 4-7; Witnesses, 7-8.

### INSOLVENCY.

**1. INSOLVENCY—GOOD CREDIT NOT INCONSISTENT WITH.**—The ability to run in debt is not the same as the ability to pay up, and will not relieve a partnership from the imputation of insolvency. A concern is not solvent unless it has property enough to pay debts. (Bailey v. Hornthal, 645.)

**2. INSOLVENCY, EVIDENCE OF, WHEN SUFFICIENT.**—If, within six months after the dissolution of a partnership and the retiring of a member therefrom, it appears that those remaining in the business failed owing seven hundred thousand dollars, of which nearly one-half was unsecured, that the assets were not sufficient to meet more than one-half of the unsecured obligations, and that there had not been any considerable shrinkage in values, or other losses, during this time, a court or jury is justified in finding that the partnership was insolvent at the time of such dissolution. (Bailey v. Hornthal, 645.)

See Attachment, 2; Banks, 3; Building and Loan Associations, 1-4; Corporations, 6, 13-15; Negotiable Instruments, 10, 11; Partnership, 5, 7.

### INSPECTION OF PREMISES.

See New Trial, 2; Trial, 3.

### INSTRUCTIONS.

**1. TRIAL—INSTRUCTIONS.**—If there is no evidence produced tending to establish circumstances which would create exceptions to a general rule, it is not error to omit all reference to such exceptions in stating the general rule to the jury. (Gilbert v. Watts-De Golyer Co., 154.)

**2. INSTRUCTIONS—HYPOTHETICAL QUESTIONS.**—It is proper to instruct a jury that they may determine from the evidence whether the facts assumed in a hypothetical question are proved,

and that, if they find that it incorrectly assumes the existence of material facts to such an extent as to impair the value of an expert's opinion based thereon, they may regard the opinion as of little or no weight. (*Grand Lodge I. O. M. A. v. Wieting*, 123.)

**3. INSTRUCTIONS—CRIMINAL LAW—DEFENDANT NOT TAKING WITNESS STAND.**—It is proper to instruct a jury that unfavorable inferences are not to be predicated upon the fact that the defendant, in a criminal case, did not take the witness stand. (*People v. Seaman*, 326.)

**4. JURY TRIAL, INSTRUCTIONS CONCERNING EVIDENCE.** A trial judge can, and, wherever it seems necessary, should, in his charge give his own opinion of the nature, bearing, and force of the evidence adduced, though a statute of the state declares that he shall state to the jury his opinion upon all questions of law arising at the trial and submit to their consideration both the law and the facts, without any direction how to find their verdict. (*State v. Main*, 30.)

See Homicide, 3, 4; Railroads, 8.

## INSURANCE.

**1. INSURANCE—CONSTRUCTION OF POLICY.**—Where the meaning of a policy of insurance is doubtful, it should be construed most favorably to the insured. If a literal construction would lead to manifest injustice to the insured, and a liberal, but still reasonable, construction would prevent injustice by not requiring an impossibility, the latter should be adopted. (*Matthews v. American Cent. Ins. Co.*, 627.)

**2. INSURANCE—AGE OF BUILDING—IMMATERIAL EVIDENCE.**—An offer, in an action on a policy of fire insurance, to prove that the age of a building is material to the risk, is properly refused, where there is no proof, or offer of proof, that the risk has been changed or increased by a misrepresentation as to the age of the building. (*Manufacturers' etc. Ins. Co. v. Zeitinger*, 105.)

**3. INSURANCE—MISREPRESENTATION OF IMMATERIAL FACT—AGE OF BUILDING.**—A representation, although false, does not avoid a policy of fire insurance, where there has been no moral fraud, unless it is material to the risk. Hence, a misrepresentation as to the age of a mill insured does not avoid the policy where the representation is not material. (*Manufacturers' etc. Ins. Co. v. Zeitinger*, 105.)

**4. INSURANCE—MATERIALITY OF REPRESENTATION—QUESTION FOR JURY.**—The materiality of a representation, in an application for fire insurance, is a question for the jury, upon the evidence, and its finding thereon, under proper instructions, will not be disturbed on appeal. (*Manufacturers' etc. Ins. Co. v. Zeitinger*, 105.)

**5. INSURANCE—CHATTEL MORTGAGE—VOID POLICY.**—If a policy of fire insurance contains a stipulation that it shall be void if the property, at the time of the execution of the policy, is covered by a chattel mortgage, there can be no recovery on the policy where the property is so encumbered, if there has been no waiver or estoppel by which the company is precluded from relying on the contract. (*Crikelair v. Citizens Ins. Co.*, 119.)

**6. INSURANCE—DEATH OF THE INSURED, FAILURE TO GIVE NOTICE AND MAKE PROOFS OF LOSS BECAUSE OF.**—It is incumbent on those interested in a policy insuring property against destruction by fire to make reasonable efforts to see that the covenants thereof are kept, and within reasonable time to use such agencies as the law provides in order that they may be kept, if pos-



sible. If the insured has died, and no executor has been appointed, because of a contest of the will of the decedent, this does not relieve the persons interested from the necessity of acting. The heirs or next of kin should, within a reasonable time, give notice of the loss and make the proof stipulated for in the policy, or procure the appointment of a special or temporary administrator to do so; and if no notice of loss is given until more than two years after the death of the insured, the insurer is relieved from liability, if the policy stipulates that the insured shall give notice immediately after the loss and make proofs of loss within sixty days. (*Matthews v. American Cent. Ins. Co.*, 627.)

7. **INSURANCE, NOTICE AND PROOFS OF LOSS, WHO MAY GIVE AND MAKE.**—If a temporary or special administrator is authorized to collect choses in action, such authority includes the power to do whatever is requisite to perfect the chose in action, so that such collection may be enforceable, and if it is a policy of insurance, he may give the notice and make the proofs of loss when it stipulates, that, in the event of loss, the insured shall give immediate notice in writing to the insurer and furnish proofs of loss, signed and sworn to by the insured. (*Matthews v. American Cent. Ins. Co.*, 627.)

8. **INSURANCE—RENDERING STATEMENT—PROOFS OF LOSS—MAIL.**—A requirement in a policy of fire insurance, that the insured within sixty days after the fire shall "render" a statement to the company, containing proofs of loss, is met by mailing the statement to the company within the time limited. (*Manufacturers' etc. Ins. Co. v. Zeitinger*, 105.)

9. **INSURANCE—TRANSFER OF AS COLLATERAL.**—The legal effect of a transfer of a policy of insurance against loss by fire is the same as a direction to pay to another in the case of loss, and, in the absence of any prohibition in the policy or by-laws, either method may be properly taken to produce the result. (*Merrill v. Colonial Mut. Fire Ins. Co.*, 268.)

10. **INSURANCE, ASSIGNMENT OF PAROL EVIDENCE TO PROVE THAT IT WAS RECEIVED AS COLLATERAL SECURITY.**—An assignment of a policy of insurance against loss by fire may be proved by parol evidence to have been given and accepted as collateral security for a debt due from the assignor to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer. (*Merrill v. Colonial Mut. Fire Ins. Co.*, 268.)

11. **INSURANCE—ASSIGNMENT AS COLLATERAL.**—The consent of the insurer that a policy of insurance may be assigned to a designated person does not require that such assignment be absolute. An assignment absolute in form, but intended as collateral security for a debt due from the assignor to the assignee, is valid, and does not avoid the policy, where such an assignment is not prohibited therein nor by the by-laws of the insurance corporation, and no misrepresentation of facts was made to the insurer, its assent being given without inquiry on its part. (*Merrill v. Colonial Mut. Fire Ins. Co.*, 268.)

12. **INSURANCE, TRANSFER OF POLICY AS COLLATERAL SECURITY.**—A policy of insurance against loss by fire may be transferred as collateral security, and, in the absence of any stipulation in the policy or any regulation of the insurer by which the assured or his assignee may be bound, the assignee may collect any sum which may become payable by the insurer by process in the assignee's own name if the insurer has assented to the assignment; otherwise, in the name of the assured. The assignment, if it leaves the assignor still interested in the contract and in the loss, does not make the insurer

ance void, because the assignee had no insurable interest in the property. (*Merrill v. Colonial Mut. Fire Ins. Co.*, 268.)

13. **INSURANCE—DELAY IN BRINGING SUIT.—THE DEATH OF THE INSURED** does not entitle his executor to bring an action long after the time stipulated for in the policy, though the appointment was delayed by the pendency of proceedings resisting the probate of the will, if, during those proceedings, those interested in the estate might have procured the appointment of a special or temporary administrator and compelled him to bring an action upon the policy within the time agreed upon therein. (*Matthews v. American Cent. Ins. Co.*, 627.)

14. **INSURANCE—DEATH OF PERSON WHOSE PROPERTY IS INSURED** does not avoid the policy, and though it provides that the insured shall give immediate notice of the loss and within sixty days sign, verify, and deliver proofs thereof, tills provision must, after such death, be given a reasonable construction, and the right to indemnity is not lost by failure to comply with it literally owing to such death and to the absence of persons qualified to give such notice and make such proofs. (*Matthews v. American Cent. Ins. Co.*, 627.)

15. **INSURANCE CEASES, WHEN—EFFECT OF WORD "ATTACHED" IN FORFEITURE CLAUSE.**—The word "attached" in a forfeiture clause of an insurance policy on a dwelling-house and barn, providing that the insurance shall cease "if the property hereby insured shall be mortgaged, levied on, or attached, or taken into possession or custody under any proceeding at law or equity, or change takes place in title or possession," has special reference to personal property, and the insurance on the house and barn, though attachments have been levied on the property, does not cease until title to the land has been divested by a sale on execution prior to a loss. (*Tefft v. Providence etc. Ins. Co.*, 761.)

16. **INSURANCE, LIFE, CONTRACT OF, 'WHEN INCOMPLETE.**—If an applicant for life insurance, after making his application, changes his mind and refuses to accept the policy when tendered, and neither he nor the beneficiary named therein pays any of the premiums nor authorizes their payment, there is no completed contract of insurance, though another person into whose possession the policy comes pays such premiums. (*Hogben v. Metropolitan Life Ins. Co.*, 53.)

17. **INSURANCE, LIFE—ANSWERS IN APPLICATION—WARRANTIES.**—If an applicant for a policy of life insurance warrants, in his application, that the representations and answers made by him therein are true, agreeing that any untrue answer shall render the policy void, and the policy makes the answers and statements in the application a part of the contract of insurance, the applicant's answer, relative to hemorrhages and the extent of his use of intoxicating liquors, are warranties. (*Sweeney v. Metropolitan Life Ins. Co.*, 751.)

18. **INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE.**—A policy of life insurance, providing that it shall be null and void if a condition therein in regard to residence is violated, is not absolutely void upon the happening of such event, but merely voidable, at the election of the company. (*Germania Life Ins. Co. v. Koehler*, 108.)

19. **INSURANCE—LIFE—CONDITIONS—WAIVER.**—The insurer can waive conditions that are for his benefit, such as one in a life insurance policy, respecting residence. (*Germania Life Ins. Co. v. Koehler*; 108.)

20. **INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE—NOTICE TO AGENT AS NOTICE TO COMPANY.**



If a local insurance agent, having power to receive premiums, receives a premium on a policy of life insurance after he has notice of the violation of a condition therein respecting residence, and which renders the policy voidable at the company's election, his knowledge is notice to the company of the fact of such residence. (*Germania Life Ins. Co. v. Koehler*, 108.)

21. **INSURANCE—LIFE—BREACH OF CONDITION AS TO RESIDENCE—WAIVER BY COMPANY—PREMIUMS.**—If one holding a policy of life insurance violates a condition therein respecting residence, under penalty of a forfeiture, and a local agent, empowered to recover premiums, receives a premium from him after knowledge of the breach of condition, the transmission of the premium to the company, and the retention thereof by it, operates as a waiver by the company of the breach. (*Germania Life Ins. Co. v. Koehler*, 108.)

22. **INSURANCE—LIFE—BREACH OF CONDITION—RECEIPT OF PREMIUMS—DUTY OF AGENT.**—It is the duty of a local insurance agent, after he has knowledge of the violation of a condition, in a life insurance policy, regarding residence, and for which a forfeiture may be declared, to ascertain from the company, before he receives a premium after such breach, whether or not a forfeiture is to be enforced. (*Germania Life Ins. Co. v. Koehler*, 108.)

23. **INSURANCE, LIFE, PREMIUMS, RIGHT TO RETURN OF THOUGH THE INSURER MAY BE ESTOPPED FROM DENYING THE VALIDITY OF THE POLICY.**—If one having no insurable interest in the life of another pays the premiums on a policy purporting to be issued on the life of the latter, such policy, never having been accepted by the assured, and such payments having been made in the mistaken belief that the policy was valid and might result in benefit to the payer, he may recover of the insurer the premiums so paid, though the latter might have been estopped, had the assured died, from contesting the validity and binding obligation of the policy. (*Hogben v. Metropolitan Life Ins. Co.*, 53.)

24. **INSURANCE—LIFE—BREACH OF CONDITION—WAIVER—PROOF OF.**—A condition in writing, in a policy of life insurance, may be waived by parol, and such waiver may be inferred from the acts and declarations of the company. (*Germania Life Ins. Co. v. Koehler*, 108.)

25. **INSURANCE, LIFE—WARRANTIES—BURDEN OF PROVING TRUTH OF.**—If it is expressly covenanted, in an application for a policy of life insurance, as a condition of liability, that the statements and declarations made in the application are true, and the truth of such statements forms the basis of the contract, the policy making the answers and statements in the application a part of the contract, the burden of proving their truth, in an action on the policy, rests upon the plaintiff, on the principle that a party cannot recover upon a conditional contract until he shows that he has complied with the conditions. (*Sweeney v. Metropolitan Life Ins. Co.*, 751.)

26. **INSURANCE, LIFE—WARRANTIES—PROVING TRUTH OF—SHIFTING BURDEN.**—The burden of proving the truth of a warranty, in a policy of insurance, cannot be shifted from the plaintiff by a rule of evidence which, in many instances, permits a prima facie case to be made out by presumption, until something is shown to rebut it. Such a rule is merely one of convenience, made to facilitate the trial of causes, and to prevent undue hardship, as, in cases where some of the answers, in an application for an insurance policy, are not in dispute, or relate to matters which were peculiarly within the knowledge of a deceased applicant. (*Sweeney v. Metropolitan Life Ins. Co.*, 751.)



**27. INSURANCE — LIFE—INSANITY—SELF-DESTRUCTION—LIABILITY.**—If a policy of life insurance contains no provision on the subject, the death of the insured by his own act resulting from insanity is as much insured against as death resulting from any other physical affliction. (Grand Lodge I. O. M. A. v. Wieting, 123.)

**28. INSURANCE — MUTUAL BENEFIT SOCIETIES—INSANITY—SUICIDE—LIABILITY.**—Although an insurance certificate of a mutual benefit society limits its liability, in case of "suicide," to the amount actually paid in, yet the society is answerable for the full amount of the certificate, although the insured did commit suicide, if the act was done while his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences, and effect of his suicidal act, or if he was impelled thereto by an uncontrollable insane impulse. (Grand Lodge I. O. M. A. v. Wieting, 123.)

**29. INSURANCE, ACCIDENT, VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.**—One who, seeing a track actually occupied by a train in readiness to be moved, undertakes to cross between the cars, because he thinks he has time to do so, but without any inquiry, is guilty of voluntary exposure to unnecessary danger, and if injured cannot recover, though insured against accident, if the policy declares that the insurance does not cover accidents resulting wholly or partly from voluntary exposure to unnecessary danger. (Willard v. Masonic etc. Accident Assn., 285.)

#### INTIMIDATION.

See Strikes, 5.

#### IRREPARABLE INJURY.

See Injunction, 2.

#### JUDGMENTS.

**1. JUDGMENT—ENTIRETY OF.**—The plaintiff who sues on a joint judgment must recover against all of the defendants or none, for the judgment is an entirety, and a defense good for one is good for all. Hence, the fact that one of them was not served with process is a good defense for the others. (Watson v. Steinau, 768.)

**2. JUDGMENTS—FINAL—WHAT ARE.**—A final judicial determination of a collateral matter distinct from the general subject of litigation affecting only the parties to that particular controversy, is a final judgment and may be appealed from. (Mutual Reserve etc. Assn. v. Smith, 172.)

**3. JUDGMENT OF A SISTER STATE, EFFECT OF.**—A judgment of a court of another state involving the construction of certain certificates or policies is conclusive upon the parties in a subsequent controversy in this state. (McMahon v. Eagle Life Assn., 306.)

**4. JUDGMENT OF SISTER STATE—ACTION OF DEBT—SERVICE OF PROCESS.**—A judgment of a court of a sister state, rendered against several defendants jointly, in an action where one of them was not served with process, cannot be enforced in this state, by an action of debt thereon even against that one of the defendants who, in the foreign court, was served with process. (Watson v. Steinau, 768.)

**5. JUDGMENT—RELIEF IN EQUITY, WHEN NOT BARRED BY THE RIGHT OF APPEAL.**—The fact that persons interested in contesting an administrator's account had an adequate remedy by appeal from an order approving such account does not preclude

them from maintaining a suit in equity for relief against such order on the ground that it was procured by fraud or collusion between the probate judge and the administrator. (*Baldwin v. Davidson*, 460.)

6. JUDGMENTS—FRAUD IN, WHEN APPEARS FROM THE CONDUCT OF THE JUDGE.—If a probate judge on being informed by persons interested in an administrator's account that they desire to contest it, replies that when it is filed, he will approve it if fair on its face, and that they could then appeal, this shows a determination on his part to approve it, whether right or wrong in fact, and when followed by his approval of the account after filing, without giving any opportunity to contest it, establishes a fraudulent and collusive arrangement between him and the administrator, entitling the persons interested in contesting the account to relief in equity. (*Baldwin v. Davidson*, 460.)

7. RES JUDICATA.—A judgment determining that certain executors took property bequeathed to them absolutely and free from any trust or condition is not conclusive in a subsequent proceeding to fasten a trust upon such property in favor of the legal representative or the next of kin or heir at law. (*Fairchild v. Edson*, 609.)

8. JUDGMENT—RES JUDICATA—WHAT ESSENTIAL TO A BAR.—To constitute a bar, a former adjudication must have been on what was actually in issue, and the determination of which was essential to the judgment. (*White v. Sherman*, 132.)

9. JUDGMENT—RES JUDICATA—RECITAL IN DECREE.—The mere preliminary recital in a decree entered by consent upon a bill praying for the appointment of a successor to a deceased trustee, that the deceased "had faithfully discharged his duties as trustee" does not preclude the beneficiaries in the trust, in a subsequent suit for an accounting, from questioning the validity of the trustee's investment of trust moneys in railroad stocks. (*White v. Sherman*, 132.)

10. RES JUDICATA—PROBATE COURT, ORDERS OF.—The approval by the probate court of the final account of an administrator is a judgment entitled to the same favorable presumptions which are accorded to the judgments of all courts of record, which can only be set aside for fraud in their procurement. (*Baldwin v. Davidson*, 460.)

11. JUDGMENTS, VOID.—One seeking any kind of affirmative relief must fail, if he bases his claim on a void judgment. (*Campbell etc. Mfg. Co. v. Marder, Luse & Co.*, 573.)

12. JUDGMENT VOID BECAUSE PREMATURELY ENTERED.—Where the service of summons against infant defendants had not been completed when judgment against them was entered, it is void. (*Darrow v. Calkins*, 637.)

13. JUDGMENTS.—A MISNOMER IN THE SUMMONS of the christian name of one of the plaintiffs does not make the judgment void, though it was entered by default. (*Bradley v. Sandilands*, 386.)

14. JUDGMENTS—JURISDICTION, DEFECTS IN SERVICE OF PROCESS.—If an attempt at service is made and actually reaches the defendant, although it be not made or returned in the form required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack. (*Campbell etc. Mfg. Co. v. Marder, Luse & Co.*, 573.)

15. JUDGMENT, MERGER BY.—If a suit is brought upon a promissory note and to foreclose a mortgage given to secure its payment, and a judgment entered, and it is found necessary to reopen the case, to bring in parties improperly omitted from the original complaint, such note is not deemed merged in the judgment as

against them, and they are, therefore, entitled to the defense of the statute of limitations, if it exists as against the note, though not as against the judgment. (*Damon v. Leque*, 927.)

See Corporations, 35; Equity, 1; Executors and Administrators, 3; Limitations of Actions, 6, 7; Quo Warranto, 2, 3; Replevin.

### JUDICIAL NOTICE.

See Evidence.

### JUDICIAL SALES.

1. JUDICIAL SALES—RIGHT TO POSTPONE.—A provision in a statute authorizing a sheriff to postpone an execution sale for want of bidders does not authorize postponement on the sole ground that only one bidder is present. (*Gilbert v. Watts-De Golyer Co.*, 154.)

2. JUDICIAL SALES—POWER TO POSTPONE.—The mere fact that the sheriff has heard, or has been unofficially advised, that there is some adverse claim of ownership to the property to be sold under execution, does not authorize him to decline to proceed with the sale. (*Gilbert v. Watts-De Golyer Co.*, 154.)

3. JUDICIAL SALES—LIABILITY FOR ARBITRARY POSTPONEMENT.—A sheriff who arbitrarily postpones an execution sale against the objection of the plaintiff therein, when there are several bidders present, one of whom will bid sufficient to prevent a sacrifice of the property, acts without authority, and is liable to the execution plaintiff for such damages as he has sustained through such act of the sheriff. (*Gilbert v. Watts-De Golyer Co.*, 154.)

See Dower, 2.

### JURISDICTION.

1. JURISDICTION TO SET ASIDE SUPERSEDEAS.—The supreme court of North Carolina has no jurisdiction to set aside, or to pass upon the regularity of, a writ of supersedeas issued by the supreme court of the United States. (*Caldwell v. Wilson*, 672.)

2. COURTS, JURISDICTION, PRESUMPTION OF.—There is a presumption that a court of general jurisdiction of another state had the jurisdiction which it assumed to exercise in construing and enforcing contracts and determining their meaning. (*McMahon v. Eagle Life Assn.*, 306.)

See Appeal, 4.

### JUSTICE OF THE PEACE.

See Evidence, 13; Process, 4.

### KNOWN VEINS.

See Mines.

### LACHES.

See Injunction, 4.

### LANDLORD AND TENANT.

1. LANDLORD AND TENANT.—A lessor is under no obligation to rebuild or restore a building destroyed without his fault, where he has not covenanted to do so. (*Wattles v. South Omaha etc. Co.*, 554.)

2. DEFINITION.—TO REPAIR means to amend or renew, or to restore or make good, an existing thing, not to make a new one.



Hence a covenant to repair does not impose an obligation to rebuild what has been destroyed without the fault of the covenantor. (*Wattles v. South Omaha etc. Co.*, 554.)

**3. LANDLORD AND TENANT—APPORTIONMENT OF RENTS.**—Where a substantial portion of the leased premises is destroyed without the fault of either party, the lessee is entitled to an apportionment of the rent covenanted to be paid and thereafter accruing, in the absence of an express assumption by him of the risk of such destruction. (*Wattles v. South Omaha etc. Co.*, 554.)

**4. LANDLORD AND TENANT—LIABILITY FOR REPAIRS—PROPERTY DESTROYED BY FIRE.**—A covenant by a lessee that he will maintain all the machinery and buildings on the leased premises "in as good condition and repair as the same now are in, and return the same to the lessor at the expiration of such lease in as good condition as the same now are in, reasonable wear and tear excepted," imposes on him the obligation to repair the buildings in the event of their destruction by fire during the continuance of the lease, though without his negligence or other fault. (*Armstrong v. Maybee*, 898.)

**5. LANDLORD AND TENANT—LIABILITY OF TENANT FOR BUILDING DESTROYED WITHOUT HIS FAULT.**—Though a lessee covenants to keep in repair the leased premises and at the expiration of the term to surrender them in as good condition as they were when he entered, ordinary wear and tear and natural decay excepted, he is not required to rebuild or restore a building destroyed without his fault, as by a hurricane. If such liability existed at the common law, that law is modified in this respect by a statute providing that in the construction of any instrument creating an interest or estate in real property, it shall be the duty of the courts to carry into effect the intent of the parties so far as it can be collected from the whole instrument. (*Wattles v. South Omaha etc. Co.*, 554.)

See Fixtures, 6.

## LARCENY.

See Actions; Statutes, 11.

## LEASES.

See Contracts, 5; Corporations, 3.

## LEGISLATURE.

**1. APPROPRIATION OF PUBLIC MONEYS DEFINED.**—To appropriate is to set apart from the public revenue a certain sum of money for a specific object in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. (*State v. Moore*, 538.)

**2. APPROPRIATION OF PUBLIC MONEY, WHAT IS NOT.**—Neither a promise on the part of the state to pay moneys for a bounty, nor promise on the part of the legislature to make an appropriation, nor a pledge of the faith of the state, can amount to an appropriation. (*State v. Moore*, 538.)

**3. APPROPRIATION OF PUBLIC MONEYS.—CERTAINTY IN THE AMOUNT** appropriated is essential to a valid appropriation of public moneys. It cannot be certain or specific where it is to be ascertained only by the requisitions which may be made by the recipients. (*State v. Moore*, 538.)

**4. APPROPRIATION OF PUBLIC MONEYS FOR THE PAYMENT OF BOUNTIES, WHAT INSUFFICIENT.**—A statute providing for the payment of a bounty of a certain sum per pound for an

article to be thereafter produced or manufactured within the state, and that when any claim made under the act is presented and verified as therein required, the auditor of the state shall draw a warrant on the treasurer thereof for the amount due, does not constitute a valid appropriation of public moneys, because it cannot be ascertained in advance what amount will become payable during any one year, nor what taxes should be levied to discharge the liabilities created by the statute. (*State v. Moore*, 538.)

See Dedication, 5; Liens, 2; Limitations of Actions, 4.

## LIENS.

**1. EXEMPT PROPERTY, LIEN FOR SERVICES THEREON.** The keeper of a livery and boarding stable for horses has a lien upon them for his reasonable charges entitling him to retain possession until his charges are paid, though the property is exempt from execution, and the constitution of the state declares that a reasonable amount of property shall be exempt from seizure and sale for the payment of any debt or liability, the amount of such exemption to be determined by law. (*Flint v. Luhrs*, 391.)

**2. CONSTITUTIONAL LAW—EXEMPTIONS.**—Though a constitution provides that a reasonable amount of property shall be exempt from seizure and sale, the legislature has power to provide that the keeper of a livery stable shall have a lien on horses boarded by him at the request of their owner, and such lien is enforceable, though the property is by law exempt from execution. (*Flint v. Luhrs*, 391.)

See Banks, 1-3; Mortgage, 4.

## LIMITATIONS OF ACTIONS.

**1. STATUTE OF LIMITATIONS, QUESTION OF—HOW SHOULD BE PRESENTED.**—If a complaint clearly shows the plaintiff's cause of action to be barred by the statute of limitations, he must raise that question by demurrer; otherwise it may be presented by answer. (*Damon v. Leque*, 927.)

**2. STATUTES OF LIMITATION—COTENANTS.**—Heirs of a partner who were infants at the time of his death, and who do not commence an action against the surviving partner for the partition of real property until thirty years after his death and more than fifteen years after the youngest of them became of age, are not barred by the statute of limitations from maintaining such action. (*Darrow v. Calkins*, 637.)

**3. STATUTE OF LIMITATIONS, ABSENCE OF MORTGAGOR FROM THE STATE.**—If one, after executing a mortgage, sells and conveys the land subject thereto and departs from the state, so that the statute of limitations does not run in his favor, the mortgage may be foreclosed as against both him and his resident grantee in possession of the land, though, but for his absence, the statute would have afforded adequate protection to all of them. (*Jenks v. Shaw*, 256.)

**4. LIMITATIONS OF ACTIONS—CHANGE IN REMEDY—REASONABLE TIME FOR BEGINNING ACTION.**—The legislature may change the remedy and the statute of limitations, which applies to the remedy, by extending or shortening the time for beginning an action, provided that, in the latter case, a reasonable time is given therefor before the statute works a bar. Such reasonable time is "the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute." (*Culbreth v. Downing*, 661.)

**5. STATUTE OF LIMITATIONS IN ACTIONS FOR DAMAGES FROM CONSTRUCTION OF DITCHES.**—Where ditches are constructed along a railway track in such a manner that the adjacent lands may be injured thereby, their owner may recover for each successive injury, and hence the statute of limitations does not commence to run against him upon the completion of the ditches. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

**6. JUDGMENTS—PAYMENT ON—STATUTE OF LIMITATIONS.**—A payment on a judgment does not arrest the running of the statute of limitations. (*McCaskill v. McKinnon*, 659.)

**7. JUDGMENTS—FINALITY—STATUTE OF LIMITATIONS.**—A judgment for a debt, including a decree for the foreclosure of the mortgage securing such debt, is final as to the debt at the time when rendered and not at the time when the sale of foreclosure is confirmed and the deficiency ascertained. The statute of limitations begins to run against the judgment plaintiff, in such case, from the time of the money judgment. (*McCaskill v. McKinnon*, 659.)

See Accounts; Judgment, 15; Mortgage, 6.

### LOCAL OPTION.

See Municipal Corporations, 3; Statutes, 8.

### MARRIAGE AND DIVORCE.

**1. MARRIAGE IS A CIVIL CONTRACT TO THE VALIDITY OF WHICH** the consent of parties able to contract is all that is required by natural law. If the contract is made per verba de praesenti, and remains without cohabitation, or is made per verba de futuro, and is followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. (*Hulett v. Carey*, 419.)

**2. MARRIAGE AND DIVORCE—MARRIAGE CONTRACT WITHOUT CEREMONY—VALIDITY OF.**—A marriage contract, without ceremony, is not valid where a ceremonial marriage between the parties would be unlawful, as where one of them has a husband or wife living. (*People v. Seaman*, 326.)

**3. MARRIAGE SECRET.**—An agreement to keep, and the actual keeping secret of a marriage does not invalidate it, although the fact of secrecy may be evidence that no marriage ever took place. (*Hulett v. Carey*, 419.)

**4. MARRIAGE WITH A LEGALLY DECLARED LUNATIC** is absolutely void ab initio, and may be so declared by the courts in a direct proceeding at any time. (*Sims v. Sims*, 665.)

**5. MARRIAGE VOID ON ACCOUNT OF LUNACY** cannot, be cured and rendered valid merely by cohabitation with the lunatic after his restoration to reason. (*Sims v. Sims*, 665.)

**6. MARRIAGE OF LUNATIC—VALIDITY—REMEDY.**—The marriage of a legally declared lunatic is void, and can be validated only by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage if the lunatic is since found to be restored to reason. (*Sims v. Sims*, 665.)

**7. MARRIAGE AND DIVORCE OF LUNATIC—GUARDIAN'S RIGHT OF ACTION.**—An action for the divorce of a lunatic may be maintained by his guardian in the name of the lunatic. (*Sims v. Sims*, 665.)

See Appeal, 10; Insane Persons, 1; Wills, 6.

### MASTER AND SERVANT.

**1. MASTER AND SERVANT, DUTY OF MASTER TO SERVANT, WHEN A QUESTION FOR THE JURY.**—Whether it is in-



cumbent upon a master or a servant to perform the duty of seeing that the appliances upon or with which he is to work are in a safe condition is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and other circumstances. (*McGorty v. Southern etc. Tel. Co.*, 62.)

2. MASTER AND SERVANT, NEGLIGENCE, WHEN SERVANT MUST SHOW THAT IT WAS NOT HIS OWN NEGLIGENCE FROM WHICH HE SUFFERED.—If a plaintiff sues to recover for injuries sustained by him from the rotten condition of a telegraph pole, and the work in which he was engaged was such that from its nature, and the terms of his contract, and from other facts and circumstances, it must have been the duty either of himself or of his employer to have made the inspection necessary to determine the condition of the pole, he must set forth in his complaint the facts showing whether this duty devolved on his employer, and whether the exercise of due care did not require the employé to examine the pole in question. (*McGorty v. Southern etc. Tel. Co.*, 62.)

3. MASTER AND SERVANT, ASSUMPTION OF RISKS.—The linemen of telephone and telegraph companies have no right to rely upon the soundness and safety of poles upon which they are to work. Employers have a right to decide how their work shall be performed, and may employ men to work in an unsafe place or with dangerous implements without incurring liability for injuries sustained by workmen who knew, or should have known, of the hazards of the service they have chosen to enter. (*McGorty v. Southern etc. Tel. Co.*, 62.)

See Railroads, 11, 12.

#### MECHANIC'S LIEN.

1. MECHANICS' LIENS.—THE AFFIDAVIT to a claim for a mechanic's lien must be broad enough to cover all the essential statements in the claim required by the statute to be set forth. (*Orr etc. Hardware Co. v. Needham Co.*, 151.)

2. MECHANIC'S LIEN, CONFLICT BETWEEN AND UNRECORDED ENCUMBRANCES.—Mechanics' lienholders are not purchasers, and must, at their peril, take notice of all liens and encumbrances, whether recorded or not. Hence, if a lien is foreclosed without making a prior encumbrancer a party, his encumbrance remains paramount to the mechanic's lien until there has been a sale under the judgment foreclosing the lien to a purchaser having no knowledge of the prior encumbrance. (*Nashua Trust Co. v. Edwards Mfg. Co.*, 226.)

3. MECHANICS' LIENS — AFFIDAVIT — SUFFICIENCY.—Under a mechanic's lien law requiring that claims for liens shall set forth the dates when the materials were furnished, an affidavit merely alleging that the claim contains a full and true statement of the materials furnished, and omitting to certify that the statement of claim is true in so far as it sets forth the times when the materials were furnished, is insufficient. (*Orr etc. Hardware Co. v. Needham Co.*, 151.)

See Assignment.

#### MERGER.

See Judgment, 15.

#### MINES.

1. MINES AND MINING — KNOWN VEINS — BURDEN OF PROOF.—One claiming a quartz lode mining claim within the

boundaries of a patented placer claim has the burden of proof to show that the vein upon which his claim is founded was "known" at the time when application was made for the placer patent. (*Casey v. Thieviege*, 511.)

**2. MINES AND MINING—KNOWN VEINS—INSUFFICIENT PROOF OF.**—Evidence of finding prior to application for a placer patent for a mining claim, streaks of quartz, croppings indicating the existence of leads and veins between granite walls upon the ground, which in the opinion of witnesses carry silver, together with proof of the location of a mining claim on one of these veins within the placer claim, and the abandonment thereof, because of the expense of working it, without an assay to ascertain its value, does not justify a verdict that such veins were "known veins or lodes" within the meaning of section 2333 of the Revised Statutes of the United States, and a judgment based on such verdict must be reversed. (*Casey v. Thieviege*, 511.)

**3. MINES AND MINING—"KNOWN VEINS."**—To meet the designation "known" veins or lodes mentioned in section 2333 of the Revised Statutes of the United States, veins or lodes within the boundaries of a placer claim at the time of the application for a patent therefor, which should be excepted from a patent issued thereon, must, at the time of such application, have been clearly ascertained and must have been of such an extent, character, and value as to justify their exploitation. (*Casey v. Thieviege*, 511.)

**4. STATUTE OF FRAUDS.—AN AGREEMENT TO PROSPECT FOR AND LOCATE MINES ON JOINT ACCOUNT,** or as mining partners, is not within the statute of frauds. Hence, one who, while prospecting under such an agreement, discovers and locates a valuable mine may be compelled to convey a moiety thereof to his partner, or to account for the latter's share of the proceeds of any sale made thereof. (*Raymond v. Johnson*, 908.)

### MISTAKE.

See Checks, 3.

### MORTGAGE.

**1. MORTGAGE.—AN ASSIGNMENT OF A MORTGAGE, THOUGH UNRECORDED,** is good against all persons except subsequent purchasers for value without notice. The holder of a mechanic's lien is not as against such assignee to be deemed a purchaser. (*Nashua Trust Co. v. Edwards Mfg. Co.*, 226.)

**2. MORTGAGE, UNRECORDED ASSIGNMENT OF.**—The transfer of a note secured by a mortgage is ineffectual as against an innocent third person having no notice of the transfer who deals with the property in good faith in the belief that the mortgagee remains the owner of the mortgage indebtedness. Hence, a purchaser of the property, though before the maturity of the mortgage debt receiving a conveyance both from the mortgagor and the mortgagee, is entitled to hold it as against an assignee whose assignment is not of record, though such purchaser did not make any inquiry respecting the note which the mortgage purported to secure, and, had he done so, must have discovered that it was not in the possession of the mortgagee. (*Jenks v. Shaw*, 256.)

**3. MORTGAGES—FORECLOSURE—PLEADING.**—A complaint to recover on a note, and to foreclose a mortgage given to secure it, does not state two separate causes of action; and plaintiff may be entitled to recover judgment on the note, although the mortgage is void. (*American Sav. etc. Assn. v. Burghardt*, 507.)

**4. MORTGAGES—CONDEMNATION PROCEEDINGS—MORTGAGEE'S LIEN.**—A mortgagee, not a party to condemnation pro-

ceedings involving part of the mortgaged premises, has a lien upon the fund derived from such proceedings equal to the lien of the mortgage, and an equity therein superior to that of subsequent judgment creditors of the mortgagor. (*Keller v. Bading*, 159.)

**5. SUBROGATION, CONVENTIONAL—PAYMENT OF FIRST MORTGAGE.**—If there are two mortgages on the same property, the second having been taken with knowledge of the first, one who, at the debtor's request, pays off the first mortgage before it is due, under an agreement that the security shall be kept alive for his benefit, and that he shall have a first lien for the money advanced, will be subrogated, in equity, as against the second mortgagee, to the rights of the first mortgagee. (*Home Sav. Bank v. Bierstadt*, 146.)

**6. MORTGAGE—STATUTE OF LIMITATIONS—POWER OF MORTGAGOR AFTER CONVEYING PROPERTY.**—One who has conveyed real property cannot revive a mortgage thereof after the bar of the statute has become complete as against his grantee who has purchased the land without assuming any obligation to discharge the debt. (*Damon v. Leque*, 927.)

See Assignment; Bonds; Costs; Dower, 2, 4-6; Equity, 2; Execution, 5; Executors and Administrators, 1, 2; Fixtures, 2-4; Homestead, 5-7; Limitations of Actions, 3; Statutes, 6.

### MORTGAGE NOTES.

See Building and Loan Associations, 1.

### MUNICIPAL CORPORATIONS.

**1. MUNICIPAL ORDINANCE, WHEN VOID FOR UNCERTAINTY.**—An ordinance declaring it to be a nuisance to erect and maintain any awning except the same be of a suitable form and attached entirely to a building is void for uncertainty in supplying no test by which the average man may, with due care, know whether he is erecting or using his awning in such a manner as not to commit a crime. (*State v. Clarke*, 45.)

**2. MUNICIPAL CORPORATIONS—DELEGATION OF POWERS.**—If a municipal corporation is satisfied that an appropriation by it to another corporation will be better distributed through the agency of the latter than through its own, it may provide for distribution by the former agency. (*Commonwealth v. Walton*, 712.)

**3. CONSTITUTIONAL LAW—LOCAL OPTION, MUNICIPAL CHARTERS.**—If a municipal charter is enacted by a legislature to go into effect whenever the common council of any city shall adopt it by a majority vote of all its members, such charter is void, because under it cities of the same class may have different charters, and this is forbidden by that provision of the constitution against special legislation respecting cities. (*State v. Copeland*, 410.)

**4. MUNICIPAL ORDINANCE REQUIRING APPLICATION OF THE TUBERCULIN TEST** to milch cows is not oppressive nor unreasonable, though it forbids the sale of any milk from cows which, from such test, appear to be diseased. (*State v. Nelson*, 399.)

**5. MUNICIPAL CORPORATIONS, MILK, REGULATING SALE OF THOUGH NOT PRODUCED WITHIN.**—A municipal corporation may by ordinance require each person desirous of selling milk within its limits to file an application, and procure a license, and submit to inspection the herd from which he supplies his milk, whether it is kept within the city or not, and that a license issue only after the applicant has removed from the herd all animals found to be affected with any infectious or contagious disease. Such ordinance is authorized by a statute empowering municipalities to provide for the inspection of milch and dairy herds kept for



the production of milk within the limits of a municipality, and to issue licenses, and to regulate the sale of milk. (*State v. Nelson*, 399.)

6. MUNICIPAL CORPORATIONS—ORDINANCES RESPECTING THE LICENSING OF ENGINEERS.—An ordinance providing for a board of engineers and imposing on it the duty of examining persons who apply to be licensed as engineers, and to grant such licenses to the applicants found qualified, and which imposes a fine on any person employing an engineer not so licensed, is valid. It does not involve any delegation of legislative power, nor does it leave the granting or withholding of such license to the whim or caprice of the board of engineers. (*St. Louis v. Meyrose Lamp Mfg. Co.*, 474.)

7. CONSTITUTIONAL LAW — MUNICIPAL GIFTS — POLICE PENSIONS.—A reasonable appropriation by a city to a corporation organized to create a fund to pension its members who are policemen is an appropriation to a strictly municipal use and necessary for the welfare and comfort of the city, and not in violation of a constitutional provision prohibiting the legislature from authorizing any city "to become a stockholder in any company, association, or corporation, or to obtain or appropriate money or to loan its credit to any corporation, association, institution, or individual." (*Commonwealth v. Walton*, 712.)

8. EXECUTION.—A MUNICIPAL CORPORATION CANNOT BE GARNISHED or subjected to proceedings supplementary to execution for wages due from it to a member of its fire department. (*Sandwich Mfg. Co. v. Krake*, 395.)

### MUTUAL BENEFIT SOCIETIES.

See Insurance, 28.

### NEGLIGENCE.

1. PLEADING.—A GENERAL ALLEGATION OF NEGLIGENCE is good against demurrer, but, upon motion, the pleader may be required to specifically state in what the negligence consisted. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

2. NEGLIGENCE OF LINEMAN IN CLIMBING POLE WITHOUT FIRST TESTING IT.—If it was a rule that a lineman should look out for his own safety in climbing poles and should inspect and test poles for himself and judge of their safety, suitable appliances being at hand for such testing, an experienced lineman must be presumed to have known of this custom, and if he climbs a pole when ordered without such test and is injured through its rotten condition, the accident must be regarded as due to his own fault or negligence. (*McGorty v. Southern etc. Tel. Co.*, 62.)

See Banks, 5; Carriers, 1, 2; Constitutions, 5; Railroads, 5-10, 14, 15, 23; Vendor and Purchaser, 3, 4.

### NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—EFFECT OF STATUTES DECLARING WHAT ARE—COUPON BONDS.—Statutes which declare certain instruments to be negotiable are merely declaratory and remedial, and do not exclude other forms of negotiable paper. Hence, although promissory notes only are declared by statute to be negotiable, a court may hold coupon bonds to be negotiable where they are, in effect, promissory notes, it being clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper. (*American Nat. Bank v. American Wood Paper Co.*, 746.)

**2. BONDS, COUPON—NEGOTIABILITY OF.**—A coupon bond, issued by a corporation, under seal, and payable to a trust company, or bearer, or, in case of registry, to the registered owner, in ten years after the date thereof, with a reservation of the privilege of paying it at any time after five years, with interest at the rate of six per cent per annum, payable semi-annually, must be treated as a negotiable security. (*American Nat. Bank v. American Wood Paper Co.*, 746.)

**3. NEGOTIABLE INSTRUMENTS — WHEN VOID AS AGAINST PUBLIC POLICY.**—If the consideration for a promissory note consists in part of an agreement to conceal from the public and from the maker's wife the fact that he has been guilty of adultery, the note is void as against public policy. (*Case v. Smith*, 341.)

**4. NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION.**—There being no liability on the part of one who seduces an affianced husband's betrothed, and who alienates her affections, a promissory note given by him to such husband for the purpose of keeping the matter quiet is void for want of consideration. (*Case v. Smith*, 341.)

**5. NOTE OR BILL OF EXCHANGE MADE OR ACCEPTED PAYABLE AT A PARTICULAR PLACE** is to be treated as payable generally, unless expressly made payable at that particular place alone. It is idle to make it payable in a particular city without naming some house or bank at which it is to be paid. (*Leonard v. Olson*, 230.)

**6. NEGOTIABLE INSTRUMENTS — MAKER'S ABSENCE FROM THE STATE.**—If the maker of a note payable on demand immediately removes from the state in which it was executed, demand for payment is not necessary to charge the indorser, but he must be notified of the dishonor of the note and that payment had not been demanded because of the maker's absence. (*Leonard v. Olson*, 230.)

**7. NEGOTIABLE INSTRUMENTS.—THE INDORSEMENT OF A NEGOTIABLE INSTRUMENT PAYABLE ON DEMAND** is presumed to have been made on the day the instrument was executed. (*Leonard v. Olson*, 230.)

**8. NEGOTIABLE INSTRUMENTS.—A PROMISSORY NOTE PAYABLE ON DEMAND** will be considered overdue and dishonored unless payment is in some manner demanded within a reasonable time. (*Leonard v. Olson*, 230.)

**9. NEGOTIABLE INSTRUMENTS PAYABLE ON DEMAND**, whether with or without interest, mature as to the indorser thereof only when payment is demanded, and it must be demanded within a reasonable time. (*Leonard v. Olson*, 230.)

**10. NEGOTIABLE INSTRUMENT.—DEMAND AND NOTICE OF DISHONOR** made and given ten years after the execution of a negotiable promissory note payable on demand with interest payable annually are not made and given within a reasonable time, though the maker has been insolvent and absent from the state ever since the execution of the note. (*Leonard v. Olson*, 230.)

**11. NEGOTIABLE INSTRUMENT—INSOLVENCY OF MAKER DOES NOT EXCUSE NOTICE OF DISHONOR.**—The fact that the maker of a note was insolvent at its execution and ever afterward does not prevent the release of the indorser by the failure of the holder to give due notice of dishonor. (*Leonard v. Olson*, 230.)

**12. NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITIES—EXTENT OF LIEN OF PLEDGEE.**—A holder of negotiable paper taken before maturity as collateral security for a pre-existing debt less in amount than the collateral is protected against equi-

ties between the original parties only to the extent of his debt. (*Yellowstone Nat. Bank v. Gagnon*, 520.)

**13. NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—RIGHTS OF PLEDGEE.**—An indorsee of negotiable paper who takes it before maturity as collateral security for a pre-existing debt is to the extent of such debt, and to that extent only, a purchaser in good faith, unaffected by equities between the original parties of which he had no notice. (*Yellowstone Nat. Bank v. Gagnon*, 520.)

See Contribution, 2.

### NEW TRIAL.

**1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—A new trial of an action for damages for personal injuries will not be granted on the ground of newly-discovered evidence, which is all directed to the question of the extent of the plaintiff's injuries, and which would not be likely to lessen the verdict if a new trial were granted. (*Whipple v. New York etc. R. R. Co.*, 796.)

**2. TRIAL—INSPECTION OF PREMISES BY JURY—MISCONDUCT—NEW TRIAL.**—If the jury upon visiting the scene of the alleged crime, question a passer-by and from him, or otherwise, elicit other evidence than that offered upon the trial, this is ground for a new trial, whether such visit of the jury was by leave of court or not. (*State v. Perry*, 683.)

### NEXT FRIEND.

See Insane Persons.

### NOTARIES PUBLIC.

See Checks, 2.

### NOTICE.

**NOTICE, WHO CHARGEABLE WITH.**—Generally, a person is charged with the knowledge of such facts as he would have ascertained had he acted with reasonable diligence and prudence upon the information he possessed. (*Wishard v. Hansen*, 238.)

See Chattel Mortgage, 3; Corporations, 7, 8; Insurance, 20.

### NUISANCE.

**1. NUISANCE—USEFUL BUILDING WHICH SHUTS OFF LIGHT.**—One has a right to erect a building for a useful purpose anywhere on his premises, such as a wood and coal house, and, though he maliciously places it within a few feet of his neighbor's tenement house in such a way as to shut off some of the light, it is not a nuisance. (*Kuzniak v. Kozminski*, 344.)

**2. NUISANCE—LAWFUL OPERATION OF WORKS AS.**—A street railway company without the right of eminent domain is liable for special injury to the property of another, caused by the lawful operation of its works. (*Rogers v. Philadelphia Traction Co.*, 716.)

**3. NUISANCE—LAWFUL BUSINESS AS.**—If a corporation has no right of eminent domain, the lawful operation of its works, causing special physical injury to another's property, is an actionable nuisance. (*Rogers v. Philadelphia Traction Co.*, 716.)

See Municipal Corporations, 1; Statutes, 14.

### OFFICERS.

**1. A PUBLIC OFFICER IS** one whose duties are in their nature public, involving in their performance the exercise of some portion



of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested equally as members of the entire body politic, or of some duly established division thereof. (*Attorney General v. Drohan*, 301.)

**2. PUBLIC OFFICE, ELIGIBILITY TO.**—If a statute declares that no trustee of a school district shall be eligible to the office of supervisor of any town or city, a person holding the former office is not eligible to an election to the latter. He cannot, by resigning after his election, become entitled to the office for which he was ineligible when elected. (*People v. Purdy*, 624.)

**3. PUBLIC OFFICE.—MEMBERSHIP IN A POLITICAL COMMITTEE BELONGING** to one party cannot constitute a public office, though the legislature has deemed it expedient to regulate by statute the election and conduct of members of such committee. The title of persons claiming to be elected members of such committee, therefore, cannot be tried on an information filed in the name of the attorney general. (*Attorney General v. Drohan*, 301.)

**4. OFFICE DE FACTO, WHO ENTITLED TO POSSESSION AS.**—One in possession of an office by virtue of a certificate of election issued by the proper officer and regular upon its face is entitled to retain possession and to perform the duties of the office without interference until such certificate is set aside by some appropriate proceeding. (*State v. Superior Court*, 893.)

**5. PUBLIC OFFICERS, CONTRACT TO PAY FOR SERVICES RENDERED AND EXPENDITURES MADE BY.**—A contract to pay an officer for services outside the line of his duties and for which the law allows him no fee is enforceable. Hence, a deputy sheriff who, at the request of another, went to a place to get evidence upon which to found a complaint and advice as to the best manner of serving a warrant may recover for his services and his necessary expenditures in doing so. (*Studley v. Ballard*, 286.)

See Elections; Execution, 4; Injunction, 1; Prohibition; Witnesses, 4.

## PARENT AND CHILD.

**A FATHER UPON THE BODY OF WHOSE DECEASED MINOR CHILD** an autopsy has been performed without his consent may maintain an action. (*Burney v. Children's Hospital*, 273.)

## PARTNERSHIP.

**1. PARTNERSHIP LANDS—THE AMERICAN RULE.**—In the absence of any agreement, express or implied, between partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves and also between the surviving partner and the real and personal representatives of the deceased partner, except that each share is impressed with a trust imposed by law in favor of the other partner, that so far as necessary, it shall be first applied to the adjustment of the partnership obligations and the payment of any balance found to be due from one partner to the other on the winding up of the partnership affairs. The working out of these rights does not require that the character of the property should be changed until an occasion arises for its conversion, and then only to the extent required. (*Darrow v. Calkins*, 637.)

**2. PARTNERSHIP LANDS, WHEN CONVERTED SO THAT THEY MUST BE DEEMED PERSONAL PROPERTY.**—If one partner conveys to another the interest of the former in partnership realty by a deed declaring that it is to be held as partnership property with the power to manage, and sell it and to pay from the proceeds to the grantor, his heirs, or assigns or legal representatives

such portion as shall, at the closing of the partnership business, belong to such grantor, his heirs, assigns, executors, or other legal representatives, such conveyance operates as a conversion of such lands into personalty as between the grantee partner and the heirs or other legal representatives of the grantor. (*Darrow v. Calkins*, 637.)

3. PARTNERSHIP.—THE LIABILITY OF A RETIRING PARTNER to firm creditors is that of principal and not of surety. (*National Cash Register Co. v. Brown*, 498.)

4. PARTNERSHIP—LIABILITY OF RETIRING PARTNER.—A retiring partner remains liable to firm creditors for firm debts notwithstanding an agreement between him and the remaining partners, or with the new firm, that they will assume and pay all such debts, provided such creditors are not parties to such agreement. (*National Cash Register Co. v. Brown*, 498.)

5. PARTNERSHIP—LIABILITY OF RETIRING PARTNER.—In an action by a firm creditor against a retiring partner to recover a firm debt, the fact that such creditor has released an attachment against the property of the remaining insolvent partner is no defense, although such release was made against the protest of the retiring partner and with knowledge of the insolvency of the remaining partner. (*National Cash Register Co. v. Brown*, 498.)

6. PARTNERSHIP—INDIVIDUAL AND PARTNERSHIP CREDITORS—PREFERENCES.—A partnership creditor can work out his equity only through the equities of the partners. If there is no partnership as a matter of fact, there is nothing upon which a partnership creditor can found a claim for preference over individual creditors. (*Himmelreich v. Shaffer*, 698.)

7. PARTNERSHIP—INDIVIDUAL AND PARTNERSHIP EXECUTION CREDITORS—PREFERENCES.—If two persons hold themselves out as partners when no partnership exists between them, an individual creditor of one of them, who levies execution upon his property, thereby gains a preference over a partnership creditor whose execution is later in date and who alleges that the execution already levied is upon partnership property. (*Himmelreich v. Shaffer*, 698.)

8. PARTNERSHIP—FRAUD UPON CREDITORS BY ALLOWING PARTNER OF INSOLVENT FIRM TO WITHDRAW CAPITAL ON RETIRING.—The present share of a partner in an insolvent firm is less than nothing, whatever may be the amount of capital brought in by him; and to permit him to withdraw from the firm any sum of money is to defraud its creditors, whether he be a special or a general partner. Hence its creditors may maintain an action to reach any moneys or property withdrawn or paid over to such retiring partner. (*Baily v. Hornthal*, 645.)

See Insolvency, 1, 2; Limitations of Actions, 2.

## PHYSICIANS AND SURGEONS.

EVIDENCE.—PROFESSIONAL COMMUNICATIONS ARE NOT PRIVILEGED WHEN made for an unlawful purpose having for their object the commission of a crime. Hence, if a physician is called upon by one woman for the purpose of producing, or assisting in producing, a miscarriage of another, communications made to him in which the patient did not participate are not privileged. (*State v. Smith*, 219.)

## PLEADING.

1. PRACTICE AND PLEADING.—A denial of knowledge sufficient to form a belief as to certain allegations in the complaint

should be disregarded when the defendant is presumed to have knowledge thereof, as where the allegation is that he made an agreement with the plaintiff. (*Raymond v. Johnson*, 908.)

2. PRACTICE.—The common counts can be used in Connecticut only as an entire complaint, and cannot follow a special count. (*McNamara v. McDonald*, 48.)

3. PLEADING—VARIANCE—WHEN NOT FATAL.—If a person is at a railway station to get mail and express matter, but is injured by an incoming train while he is trying to pick up a mail pouch thrown from another train, as the proof shows, by a mail agent, upon the track in front of the train coming in, and he brings suit for the injury, there is not a fatal variance, although the declaration alleges that the defendant was engaged in transporting the mail, and that it was customary for it to deliver the mail to the plaintiff at the place where the accident occurred. (*Tubbs v. Michigan Cent. R. R. Co.*, 320.)

4. PRACTICE, ANSWER WHEN NEED NOT BE ANSWERED. If an answer avers a settlement between a plaintiff and a defendant respecting the matters in controversy, such answer need not be replied to under a statute requiring the plaintiff to reply "where some matter is alleged in the answer to which plaintiff claims to have a defense by reason of the existence of some fact which avoids the material allegation in the answer." (*Higley v. Burlington etc. Ry. Co.*, 250.)

See Limitations of Actions, 1; Mortgage, 3; Negligence, 1.

#### PLEDGE.

See Contribution, 2; Negotiable Instruments, 12.

#### POLICE PENSIONS.

See Municipal Corporations, 7.

#### POWERS.

1. POWERS—EXECUTION OF—INTENTION.—An instrument cannot be given effect as an execution of a power unless the intention of the donee of the power to execute it is so apparent that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention is doubtful, the doubt will prevent the instrument from being deemed an execution of the power. (*Mason v. Wheeler*, 734.)

2. POWERS—EXECUTION OF POWER OF APPOINTMENT BY A RESIDUARY CLAUSE IN THE DONEE'S WILL.—If a testatrix gives to her husband, subject to his right of curtesy, all her estate in trust to pay over the income to her daughter during her life, with direction that, upon the daughter's death, the trust estate shall be conveyed and paid over to such persons as the daughter shall by will appoint, and that, in default of such appointment, it shall go to a designated class, and the daughter dies, leaving a will, in which, after providing for the payment of debts, etc., and giving pecuniary and other legacies, she devises the residue of her estate, "real" and personal, to her father, should he survive her, but the will does not refer to the power and makes no mention or reference specifically to the property which is subject to the power, and the father survives the daughter, such residuary clause does not execute the power of appointment, as the daughter's intention to execute it is doubtful. (*Mason v. Wheeler*, 734.)

#### PREFERENCE OF CREDITORS.

See Corporations, 14-18; Partnership, 6, 7.



**PRESUMPTIONS.**

See Carriers, 3, 4; Chattel Mortgage, 4; Deeds, 4; Depositions; Evidence; Execution, 4; Jurisdiction, 2; Railroads, 9; Trusts, 3; Wills, 15.

**PRIVILEGED COMMUNICATIONS.**

See Physicians and Surgeons.

**PRIVITY.**

See Assignment.

**PROCESS.**

1. **AN OFFICER'S RETURN OF THE SERVICE OF PROCESS** can be impeached collaterally. (Campbell etc. Mfg. Co. v. Marder, Lusé & Co., 573.)

2. **PROCESS—SERVICE OF SUMMONS.**—Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. (Sanford v. Edwards, 482.)

3. **PROCESS—SERVICE OF SUMMONS.**—A statute providing for service of summons by reading it to defendant personally, or by leaving a copy at his place of residence, is not sufficiently complied with by a delivery of a copy of the summons to the defendant personally, and a judgment rendered upon such service is without jurisdiction and void. (Sanford v. Edwards, 482.)

4. **PROCESS—EVIDENCE OF MANNER OF SERVICE OF SUMMONS.**—In an action on a justice's judgment brought in the district court, parol evidence is not admissible to show the manner of service of summons in the justice's court and that such service was made in compliance with the statute. (Sanford v. Edwards, 482.)

See Corporations, 35; Judgment, 4, 13, 14.

**PROHIBITION.**

**THE WRIT OF PROHIBITION** will not issue to prevent a court of equity from proceeding with a suit for an injunction to protect the complainant in his possession of an office of which he claims to be the incumbent de facto, where he does not seek, and the court does not propose, to try the title to the office, but only to inquire whether the complainant is an officer de facto, and, if so, to protect him in the possession of the office until his title thereto can be questioned by some appropriate proceeding by those who choose to assail it. (State v. Superior Court, 893.)

**PUBLIC LANDS.**

See Homestead, 2; Waters, 2.

**PUBLIC POLICY.**

See Corporations, 21, 22; Negotiable Instruments, 3.

**QUO WARRANTO.**

1. **QUO WARRANTO.—AN INFORMATION IN THE NAME OF THE ATTORNEY GENERAL** cannot be maintained to try the title to any other than a public office. (Attorney General v. Drohan, 301.)

2. **QUO WARRANTO—CONCLUSIVENESS OF JUDGMENT.**—A judgment of the state supreme court in quo warranto proceedings to try the title to an office, in favor of a relator who has been ap-

pointed to, and qualified for, such office, is not superseded by a writ of error from the supreme court of the United States, whether regular or irregular. (*Caldwell v. Wilson*, 672.)

3. **QUO WARRANTO—EFFECT OF JUDGMENT IN.**—In a proceeding by quo warranto to try title to an office to which the relator has been appointed, a judgment of the state supreme court in his favor, *ex proprio vigore*, upon being filed, places him in possession of the office, with the right to exercise the duties thereof and draw the salary attached thereto from the time of his appointment, without the issue of execution for that purpose, but, if execution is unnecessarily issued, it cannot be recalled upon motion of the defendant. (*Caldwell v. Wilson*, 672.)

See Contempt.

## RAILROADS.

1. **RAILWAYS.—GRANT OF RIGHT OF WAY WITH RELEASE OF DAMAGES** does not relieve from liability for subsequent negligence. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

2. **RAILWAYS.—A GRANT OF THE RIGHT OF WAY** for the construction of a railroad and the release of all damages to accrue from such construction have no greater effect than a judgment rendered in a condemnation proceeding, and hence do not relieve the corporation from liability for the negligent construction, maintenance, and operation of its road. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

3. **IF A RAILWAY CORPORATION CARELESSLY AND NEGLECTENTLY CONSTRUCTS DITCHES ALONG ITS TRACK**, whereby lands are overflowed and crops damaged, it is answerable therefor, though the owner of such land has granted the right of way through it and released the corporation from all damages which he might sustain by the construction or use of the railroad. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

4. **RAILWAYS, LIABILITY OF FOR DITCHES.**—That a ditch is properly constructed along the track of a railway with reference to its use for railway purposes does not relieve the corporation from liability to the owner of the adjacent lands, if such ditch was so constructed as to unnecessarily and negligently injure his property. (*Fremont etc. R. R. Co. v. Harlin*, 578.)

5. **RAILROADS—NEGLIGENCE—RUNNING TRAIN AT STATION.**—It is negligence for a railroad company to run a train between its passenger house and another train opposite the station, engaged in discharging passengers, mail, and express matter. (*Tubbs v. Michigan Cent. R. R. Co.*, 320.)

6. **RAILROADS—NEGLIGENCE—WAITING FOR TRAIN TO COME TO A STANDSTILL.**—It cannot be said, as a matter of law, that persons having business with a railroad train at a way station, at which the stop is but momentary, are guilty of contributory negligence in not waiting until the train comes to a standstill. It is usual for them to take their position near the track and wait for the train to stop; and this custom is so general that it must be within the knowledge of those operating trains. (*Tubbs v. Michigan Cent. R. R. Co.*, 320.)

7. **RAILROADS—CONTRIBUTORY NEGLIGENCE—TAKING MAIL POUCH FROM TRACK.**—If a person is at a railroad station for the purpose of receiving mail and express, and a mail agent throws off a mail pouch in front of a train advancing from the opposite direction, while the train from which it is thrown is still in motion, the question as to whether such person was guilty of contributory negligence in springing to take up the pouch, without looking to see whether another train was approaching, is a question for

the jury, especially where he knew that it was not the custom for trains to so pass at that point. (*Tubbs v. Michigan Cent. R. R. Co.*, 320.)

**8. RAILROADS — NEGLIGENCE — SIGNALS — INSTRUCTIONS.**—On the trial of an action to recover for personal injury resulting from the negligence of a railroad employé in giving an "all right" or "go ahead" signal to a passing train when the switch was open, thereby causing a wreck, it is error to instruct the jury that, "it being admitted that the switch was capable of bearing a signal light which would have shown red when the track was unsafe, it was the duty of the company to use such signal light upon the switch." (*Pleasants v. Raleigh etc. R. R. Co.*, 674.)

**9. RAILROADS—NEGLIGENCE OF EMPLOYEE—PRESUMPTION.**—Evidence that the conductor of a freight train, who had been employed as such for about three weeks, negligently left a switch open, resulting in the wreck of a passing train and personal injury, is sufficient to raise a presumption of negligence against the railroad company in the employment of an incompetent servant, and presents an issue which should be presented to the jury for determination under proper instructions. (*Pleasants v. Raleigh etc. R. R. Co.*, 674.)

**10. RAILROADS—NEGLIGENCE.—OPEN SWITCH AS EVIDENCE OF.**—The fact that a railroad switch is left open, whereby an accident occurs to a passing train resulting in personal injury, is not evidence of a defect in the roadbed and consequent negligence on the part of the railroad company. (*Pleasants v. Raleigh etc. R. R. Co.*, 674.)

**11. RAILROAD COMPANIES AS MASTERS—SAFE PLACE TO WORK.**—A railroad company, like any other employer, must use ordinary and reasonable care not to subject its servant to unreasonable danger by putting him at work on dangerous premises, or with dangerous appliances. If it fails in this respect, and the servant is injured in consequence of such failure, without fault on his part, and without having voluntarily assumed the risk of the company's negligence, with full knowledge, or competent means of knowledge, of the danger, he is entitled to recover. (*Whipple v. New York etc. R. R. Co.*, 796.)

**12. MASTER AND SERVANT—FELLOW-SERVANTS.**—The conductor on a sidetracked train upon whom devolves the duty to close the switch and give the signal "all right" for the passage of another train on the main line is the fellow-servant of the engineer of the main line train, when both are employed by the same company. (*Pleasants v. Raleigh etc. R. R. Co.*, 674.)

**13. RAILROAD COMPANIES—TELEGRAPH POLE—OBVIOUS DANGER.**—If a telegraph pole stands about three and one-half feet from a railroad track, but inclines toward it, the danger in passing it on a freight-car is not obvious from reasonable observation, where the space between the pole and the top of the car is about fifteen inches, which is sufficient for a man to pass, if standing erect on a ladder at the side of the car, but insufficient by seven or eight inches for him so to pass while in the act of climbing the ladder. Hence, if a brakeman, having no knowledge of the dangerous proximity of the pole to the track, is knocked from a freight-car and injured, by striking the pole, while climbing such ladder, in the performance of his duties, the company is answerable to him, in an action for the injury, as the danger cannot be said to have been so obvious as to charge the plaintiff with knowledge of it. (*Whipple v. New York etc. R. R. Co.*, 796.)

**14. RAILROAD COMPANIES—NEGLIGENCE—DANGEROUS TELEGRAPH POLE.**—A railroad company which maintains a tele-



graph pole slanting toward the track, and in such close proximity thereto as to make it dangerous for the company's brakemen, while properly performing their duties, is guilty of negligence, and is answerable to a brakeman injured thereby, without fault on his part, where he is exercising ordinary care, and has not assumed the risk of the company's negligence, with full knowledge, or competent means of knowledge of the danger. (*Whipple v. New York etc. R. R. Co.*, 796.)

15. RAILROAD COMPANIES—INJURY TO BRAKEMAN FROM TELEGRAPH POLE—CONTRIBUTORY NEGLIGENCE.—A brakeman employed by a railroad company in the making of freight trains is not, as a matter of law, guilty of contributory negligence in attempting to climb a ladder on the side of a freight-car, while the car is in motion, without looking forward to see whether he is in danger of being struck by a telegraph pole standing in dangerous proximity to the track and slanting toward it, where he has no particular reason to apprehend danger from it. He has a right, until apprised to the contrary, to rely on the presumption that the company has performed its duty in locating the pole so that it will not endanger the safety of its employes. (*Whipple v. New York etc. R. R. Co.*, 796.)

16. EVIDENCE—DISTANCE BETWEEN CAR AND TELEGRAPH POLE.—In an action by a brakeman, who was injured, while engaged in making up a freight train, by being struck and knocked from a certain freight-car by a telegraph pole standing in dangerous proximity to the track and slanting toward it, the distance between the pole and the side of that particular car may be proved by showing the distance between the pole and another car of the same pattern and dimensions as the one on which the injury occurred, where the plaintiff has no means of identifying the latter, and it is not shown that it is available for measurement. (*Whipple v. New York etc. R. R. Co.*, 796.)

17. CARRIERS—ACTION FOR WRONGFUL DEATH OF PASSENGER.—There can be no recovery against a railroad company for the negligent killing of a person, alleged to have been a passenger upon the defendant's train, without proof that he was a passenger, and that he was exercising ordinary care and prudence for his safety when killed. (*Illinois Cent. R. R. Co. v. O'Keefe*, 68.)

18. CARRIERS—WHO IS NOT A PASSENGER—QUESTION OF LAW.—In an action against a railroad company for negligently killing one alleged to have been a passenger on a train, it is proper to instruct the jury to find the defendant not guilty, if there is no evidence to establish the fact that the deceased was a passenger on the defendant's train. (*Illinois Cent. R. R. Co. v. O'Keefe*, 68.)

19. CARRIERS—BECOMING A PASSENGER—KNOWLEDGE OR CONSENT OF CARRIER'S AGENTS.—If a person boards a moving railroad train between the engine and the baggage-car, and is, within a few minutes afterward, negligently killed in a collision, the fact that the engineer and conductor knew that he boarded the train, but did not know who he was, or for what purpose he was there, does not tend to show that the company accepted him as a passenger. (*Illinois Cent. R. R. Co. v. O'Keefe*, 68.)

20. CARRIERS—BECOMING A PASSENGER—BOARDING A MOVING TRAIN.—The act of boarding a moving railroad train, after it has left the station, without the invitation or consent of any authorized agent of the railroad company, does not make one a passenger, although he intended to become one by his act, and held a free pass over the company's line. (*Illinois Cent. R. R. Co. v. O'Keefe*, 68.)

21. RAILROADS—STATUS OF PERSON HAVING BUSINESS AT STATION.—One at a railroad station for the necessary and cus-

tomary purpose of receiving mail and express matter from a train, is there by invitation, and is entitled to the same protection as a passenger. (*Tubbs v. Michigan Cent. R. R. Co.*, 320.)

**22. RAILROADS—EMPLOYEE WHEN PASSENGER.**—An employé of a railroad company, who is carried to and from his work on a train in consideration of a reduction in the price of his wages, is a passenger while being thus carried. (*McNulty v. Pennsylvania R. R. Co.*, 721.)

**23. RAILROADS—EMPLOYEE WHEN PASSENGER—NEGLIGENCE OF FELLOW EMPLOYEE.**—An employé of a railroad company, who, in addition to his wages, is given free transportation to and from his work as part of the consideration for the services rendered, is a passenger while being thus transported. If then injured or killed through the negligence of another employé of the railroad company, the latter is liable therefor. (*McNulty v. Pennsylvania R. R. Co.*, 721.)

See Carriers; Damages, 1, 7; Execution, 5; Limitations of Actions, 5; Pleading, 3.

### **RATIFICATION.**

See Sales, 5.

### **RECEIPTS.**

See Bills of Lading, 2, 3; Estoppel.

### **RECEIVERS.**

See Building and Loan Associations, 1, 2, 4.

### **RECLAMATION OF SUBMERGED LANDS.**

See Dedication, 2; Waters, 12, 15.

### **REPLEVIN.**

**REPLEVIN—JUDGMENT IN FAVOR OF THE HOLDER OF A LIEN OR SPECIAL INTEREST.**—In replevin by the general owner of chattels against one claiming a lien or a special property therein, if the latter recovers, the judgment should be for the return of the property to him or for the value of his special interest, if it is less than the value of the property. (*Flint v. Luhrs*, 391.)

### **RESCISSION.**

See Contracts, 6; Sales, 6.

### **RESTRAINT OF TRADE.**

See Contracts, 3, 4; Damages, 6; Injunction, 7.

### **RIPARIAN RIGHTS.**

See Waters.

### **SALES.**

**1. SALES BY SAMPLE—RIGHT OF INSPECTION.**—If goods are bought by sample, the right to inspect before acceptance always exists; and, if the goods are not up to the sample, the buyer has a right to refuse them. The buyer cannot be required to inspect the goods at the shipping point, but is entitled to a reasonable opportunity to do so after their arrival. (*Kuppenheimer v. Wertheimer*, 317.)

2. SALES BY SAMPLE—WHEN TITLE PASSES UPON DELIVERY TO CARRIER.—If goods in Illinois are verbally ordered, by sample, to be shipped here, with the privilege of examination, to see if they correspond with the sample, the price to be remitted at once if they do so correspond, it is an Illinois contract, and, in the absence of any understanding that title shall not pass until the goods are inspected, the sale is complete, and title passes upon delivery of the goods to the carrier, subject to the right of inspection. (*Kuppenheimer v. Wertheimer*, 317.)

3. SALES—DELIVERY—SHIPMENT.—A seller who agrees to ship the goods sold to the buyer on or before a certain day complies with his contract when he delivers the goods on such date to a carrier for transportation on a regular line of transportation between the point of shipment and destination. He is under no obligation to ascertain that the carrier moves the goods toward their destination on the day specified. (*Clark v. Lindsay*, 479.)

4. WARRANTY OF QUALITY, BREACH OF NOT WAIVED BY ACCEPTANCE.—Where one contracts to furnish brick to be used in the construction of buildings, and that they shall be good building brick in every respect, he is answerable in damages if he furnished inferior brick. The acceptance and use of the brick do not constitute a waiver of the right to object to their quality nor of the right to recover the difference between the value of the bricks furnished and those agreed to be furnished. (*Laporte Imp. Co. v. Brock*, 245.)

5. FRAUDULENT SALE, RATIFICATION OF, WHAT IS NOT.—The endeavor of a vendor to obtain security for goods sold by him does not preclude him from rescinding the sale for fraud, if, at the time of such endeavor, he was not aware of the facts entitling him to rescind. (*Woonsocket Rubber Co. v. Loewenberg*, 902.)

6. SALE PROCURED BY FRAUD—RIGHT OF RESCISSION. One who is induced by fraud to sell his property on credit may disaffirm the sale and recover the property from the fraudulent vendee or from a vendee of the latter who has not made any other payment therefor than the surrender of pre-existing indebtedness. (*Woonsocket Rubber Co. v. Loewenberg*, 902.)

7. FRAUD IN SALE, QUESTION OF, WHEN FOR THE JURY.—If the plaintiff claims that he was induced to make a sale on credit on the representation of the defendants that they were perfectly solvent, that their real property was worth twice as much as their debts, and that they directed his attention to statements made by them to a mercantile agency, which were false, but the defendants testify that they made no statements to the plaintiff respecting their solvency, and that the statements made to the mercantile agency were not made to obtain credit, but to avoid black-mailing, the question whether the sale was induced by fraudulent representations should be submitted to the jury. (*Woonsocket Rubber Co. v. Loewenberg*, 902.)

8. BONA FIDE PURCHASER—PRE-EXISTING INDEBTEDNESS.—An assignment of goods obtained by the vendor by fraud, where the consideration of such assignment is the payment of a pre-existing indebtedness, does not constitute the assignee a bona fide purchaser for value. Hence such goods may be recovered from him by a person from whom they were procured by fraud. (*Woonsocket Rubber Co. v. Loewenberg*, 902.)

See Damages, 3, 4.

## SEDUCTION.

1. SEDUCTION—ALIENATION OF AFFECTIONS—AFFIANCED HUSBAND'S RIGHT OF ACTION.—An affianced husband



has no right of action for the seduction or the alienation of the affections of his betrothed wife. (Case v. Smith, 341.)

2. SEDUCTION—PROMISE TO MARRY ESSENTIAL TO.—The gist of the offense of seduction is the promise of defendant to marry the prosecutrix and the yielding by her of her virtue in consequence of such promise. (McCullar v. State, 847.)

3. SEDUCTION—PROSECUTRIX AS ACCOMPLICE—CORROBORATION.—In seduction, the prosecutrix is an accomplice, and the court should instruct the jury that in order to convict they must believe that the defendant promised to marry the prosecutrix, and that, by reason of such promise, she was induced to yield her virtue to him, and that there must be testimony outside of that given by her, tending to show that he induced her to have carnal intercourse with him by reason of his promise to marry her. (McCullar v. State, 847.)

4. SEDUCTION—EVIDENCE OF CHARACTER—IMPROPER REMARKS ON WEIGHT OF EVIDENCE.—If, on a trial for seduction, a witness has testified that the reputation of the prosecutrix for chastity is good, and, on cross-examination, has testified that he has never heard anyone speak of her reputation in that respect, and the court, in overruling a motion to exclude such testimony, remarks that "there is no higher evidence of the good character of a person than that it was never discussed; that fact is the very best evidence of good character," such remarks are clearly upon the weight of evidence and erroneous, and justify a reversal of the judgment. (McCullar v. State, 847.)

#### SELF-DESTRUCTION.

See Insane Persons, 5; Insurance, 27.

#### SHERIFFS.

See Execution, 1; Judicial Sales, 1-3; Statutes, 1.

#### SHIPPING.

SHIPPING—STEAM DREDGE—WHETHER A WATERCRAFT.—The sole purpose of a steam dredge is to dig, not to navigate; and the "watercraft" law cannot be construed to include a dredge that is not used for the transportation of passengers, freight, or even the material brought up by it from the beds of rivers or lakes. No lien can, therefore, be enforced against it, for labor and materials furnished in its construction, under a statute giving a lien for labor and materials furnished upon "every watercraft used, or intended to be used, in navigating the waters of this state." (Bartlett v. Steam Dredge, 314.)

#### SODOMY.

SODOMY WITH A WOMAN.—Copulation of a man with a woman by penetrating her anus is sodomy. The term "mankind," as used in statutes defining sodomy, includes woman. (Lewis v. State, 831.)

#### SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—CONTRACT FOR PERSONAL SERVICES—WANT OF MUTUALITY.—Where a contract is made between a newspaper corporation and an editor by which he purchases a portion of its capital stock, and is employed for a number of years, and is given sole control of the paper, and it is agreed that if the profits of the paper shall not be during that period, a sum specified, or if he shall accept any public or political office, or under-

take any other business, or should die, resign, or become unable to perform the duties of editor and manager, his salary shall cease, and that he will sell his stock at a valuation to be fixed by arbitration, such contract is not so deficient in mutuality as to deprive a court of equity of jurisdiction to compel its specific performance at his instance. (*Jones v. Williams*, 436.)

STATES.

THE OBLIGATIONS OF A STATE MAY BE AVOIDED by a failure to make the appropriations necessary to discharge them. (*State v. Moore*, 538.)

STATUTE OF FRAUDS.

See Contracts, 5; Mines, 4.

STATUTES.

1. STATUTES, CONSTRUCTION OF.—A statute entitled "An act relating to the sale of property under execution and the confirmation of sheriff's sales," and repealing certain designated sections of the act relating to the redemption of real estate sold on decree of foreclosure and execution, and providing that, in case of foreclosure of mortgages or other liens, nothing shall prevent a sale of the entire premises included within the mortgage or lien, applies to sales under decrees foreclosing mortgages. (*Swinburne v. Mills*, 932.)

2. STATUTES, CONSTRUCTION OF BY DEPARTMENTS OF GOVERNMENT.—Where the legislature in framing a statute employs language similar in its import to the language of other acts which have received a practical construction by the executive department and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given in the earlier. (*State v. Moore*, 538.)

3. STATUTE, WHEN NOT VOID FOR UNCERTAINTY.—A statute authorizing the destruction of fruit trees infected by "the yellows" is not void for indefiniteness or uncertainty, if the court can take judicial notice that the term "yellows" was one the meaning of which was clearly defined by common usage. (*State v. Main*, 30.)

4. STATUTES, WHEN RETROACTIVE.—A statute respecting sales under judgments and decrees declaring, "This act shall not apply to judgments entered prior to the taking effect thereof, nor to executions which shall issue thereupon," applies to judgments and decrees entered after its passage, though based upon contracts and transactions occurring before, and is to that extent retroactive. (*Swinburne v. Mills*, 932.)

5. CONSTITUTIONAL LAW—IMPAIRING THE OBLIGATION OF CONTRACTS.—If the effect of a contract is deteriorated or substantially lessened by the passage of an act, the obligation of the contract is impaired. The obligation of a contract is the means which, at the time of its creation, the law afforded for its enforcement. (*Swinburne v. Mills*, 932.)

6. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—STAY AND APPRAISEMENT LAWS.—A statute providing for a stay of execution for a year after the entry of a judgment of foreclosure and for the appraisal of the property and the vacating of any sale thereof which does not realize eighty per cent of such appraisement cannot be applied to pre-existing mortgages without impairing the obligation of contracts, and hence is unconstitutional if sought to be so applied. (*Swinburne v. Mills*, 932.)

7. CONSTITUTIONAL LAW.—A SPECIAL LAW CANNOT BE MODIFIED OR PARTIALLY repealed by a special law, if the state constitution declares that the legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same. (*State v. Copeland*, 410.)

8. CONSTITUTIONALITY OF LOCAL OPTION LAWS.—A law cannot be passed to take effect if the voters of the whole state so decide; but where municipalities have a special or particular interest in a law, it may be passed to take effect therein, when accepted by some authoritative body representing the municipality, unless its passage is prohibited by inhibitions of special legislation. (*State v. Copeland*, 410.)

9. STATUTES — WHEN PENAL.—A statute is clearly penal where it imposes a liability upon a person for its violation, and the only object of an action under it is to recover a penalty or forfeiture. (*Aylsworth v. Curtis*, 785.)

10. STATUTES—PENAL IN PART—REMEDIAL IN PART.—The same statute may be penal in one part and remedial in another. (*Aylsworth v. Curtis*, 785.)

11. STATUTES—REMEDIAL—DAMAGES FOR LARCENY.—A statute providing that, "whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration," simply provides a remedy in favor of the person whose goods are stolen whereby he may recover damages for the wrong and injury sustained. It is, therefore, remedial and not penal. (*Aylsworth v. Curtis*, 785.)

12. STATUTES—WHEN REMEDIAL.—If a statute, giving damages wholly to a party injured as compensation for a wrong and injury, has for its object more the indemnification of the plaintiff, in an action under it, than the punishment of the defendant, the statute is not penal, but remedial. (*Aylsworth v. Curtis*, 785.)

13. CONSTITUTIONAL LAW — DISCRIMINATION — EQUAL PROTECTION—OWNERS OF STOCK RUNNING AT LARGE.—A statute providing that resident owners of stock found running at large in a town shall pay a greater penalty therefor than nonresident owners is a mere police regulation and not unconstitutional as granting exclusive privileges to a set of men, nor as denying to anyone the equal protection of the laws. (*Broadford v. Fayetteville*, 668.)

14. CONSTITUTIONAL LAW—NUISANCE, STATUTE DECLARING SUPPOSED DISEASE TO BE A.—A statute declaring fruit trees diseased by "the yellows" to be a public nuisance is not unconstitutional, if the court can say that reasonable apprehensions of danger from the disease were entertained in the public mind, and that it was not impossible that it was dangerous because contagious. (*State v. Main*, 30.)

15. CONSTITUTIONAL LAW—DESTRUCTION OF TREES TO PREVENT THE SPREAD OF A DISEASE AMONG OTHERS.—If a disease exists, commonly known as "the yellows," by which fruit trees are injuriously affected, and if there is a reasonable apprehension that such disease is contagious, a statute authorizing or requiring the destruction of trees affected by such disease is constitutional. The authority to destroy trees so affected may be given to a public officer, to be exercised after due inspection and without any preliminary judicial inquiry and without compensating the owner for any resulting loss. (*State v. Main*, 30.)

See Appeal, 3; Forgery, 3, 4; Landlord and Tenant, 5; Legislature, 4; Limitations of Actions, 4; Officers, 2; Process, 2, 3; Trial, 6.



**STATUTES OF LIMITATION.**

See Limitations of Actions.

**STENOGRAPHIC NOTES.**

See Evidence, 8.

**STRIKES.**

**1. STRIKERS—RIGHT OF STRIKERS TO INTERFERE WITH LABORERS.**—The time of men employed to take the place of strikers, when on their way to work, cannot be lawfully taken up and their progress interfered with by strikers under pretense or claim of right to argue with or persuade them to break their contracts. (*O'Neill v. Behanna*, 702.)

**2. STRIKERS—LIABILITY OF STRIKERS FOR DAMAGES.**—All who take part personally in the unlawful conduct of strikers, or act in such combination as makes them liable for the acts of the others, done in pursuance of the common purpose, are answerable for all damages resulting to the employer therefrom. (*O'Neill v. Behanna*, 702.)

**3. STRIKES—END OF STRIKE—LIABILITY OF STRIKERS THEREAFTER.**—An action against strikers to recover damages resulting from their unlawful acts may be proceeded with and a recovery had after the strike has ended. (*O'Neill v. Behanna*, 702.)

**4. STRIKES—INTIMIDATION—LIABILITY IN DAMAGES.**—Strikers who induce newly employed men to break their contracts by meeting and following them in large numbers and calling them opprobrious names, sometimes surrounding them and endeavoring to pull them away, are liable to the employer for all damages suffered by him in consequence. (*O'Neill v. Behanna*, 702.)

**5. STRIKES—INTIMIDATION, WHAT IS—INJUNCTION.**—A display of force by strikers against laborers desiring to work, such as surrounding them, calling them opprobrious names, and in a hostile and vicious manner urging them not to go to work, is intimidation, though no force is actually used, and as such is as unlawful as violence itself. Such acts may be restrained by injunction and the actors held liable to the employer for all damages resulting from their acts. (*O'Neill v. Behanna*, 702.)

**SUBROGATION.**

**1. SUBROGATION—VOLUNTEER.**—If a debt is paid at the request of the debtor, the person so paying is never a volunteer. (*Home Sav. Bank v. Bierstadt*, 146.)

**2. SUBROGATION—CONVENTIONAL—RELEASE OF SATISFIED ENCUMBRANCE.**—The principle of conventional subrogation will be applied, in equity, even where the record shows a release of the satisfied encumbrance, and as against a subsequent encumbrancer whose encumbrance has not been taken, or his position changed because of the record showing the discharge of the senior encumbrance; as, for example, against a second mortgagee where the first mortgage was released upon the execution of a new mortgage given to secure money advanced by a third person to discharge the first mortgage. (*Home Sav. Bank v. Bierstadt*, 146.)

**3. SUBROGATION—LEGAL AND CONVENTIONAL.**—The right of subrogation which springs from the mere fact of paying another's debt, as insurer, guarantor, surety, or for the purpose of protecting the right of the one who pays, is termed legal subroga-

tion; but the right of subrogation springing from an express agreement with the debtor that the security shall be kept alive for the benefit of the person making the payment, is called conventional subrogation. (*Home Sav. Bank v. Bierstadt*, 146.)

See Mortgage, 5.

### SUICIDE.

See Insurance, 28.

### SUPREME COURT.

See Appeal, 1; Jurisdiction, 1.

### SURETYSHIP.

See Agency, 2; Corporation, 17; Partnership, 3.

### TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—RELATION BETWEEN COMPANY AND RECEIVER OF DISPATCH.—No relation of contract exists between the receiver of a dispatch and the telegraph company, and the proper remedy of the former for damages on account of its alteration is an action in tort. (*Webbe v. Western Union Tel. Co.*, 207.)

2. TELEGRAPH COMPANIES—RULES, WHEN NOT BINDING.—A rule adopted by a telegraph company regulating its relations with its patrons, is not binding upon them without their assent, although they have knowledge thereof. (*Webbe v. Western Union Tel. Co.*, 207.)

3. TELEGRAPH COMPANIES—RECEIVER OF DISPATCH—WHETHER BOUND BY PRINTED CONDITIONS.—A receiver of a telegraphic message suing the company in tort for negligent alteration in transmission, is not bound by printed conditions appearing on the message as received, to which he has not assented, but of which he has knowledge. (*Webbe v. Western Union Tel. Co.*, 207.)

4. TELEGRAPH COMPANIES—STIPULATIONS ON BLANKS, WHETHER BINDING ON RECEIVER OF MESSAGE.—A receiver of a telegraphic message is not bound by provisions printed thereon requiring a claim to be presented within sixty days, in the absence of proof that he assented to such provision, although he had notice thereof. (*Webbe v. Western Union Tel. Co.*, 207.)

5. TELEGRAPH COMPANIES—KNOWLEDGE OF CONDITIONS—WHEN QUESTION FOR JURY.—The question whether the receiver of a telegraphic message who has used the blanks of the company for several years has knowledge of the printed conditions thereon is a question for the jury to determine. (*Webbe v. Western Union Tel. Co.*, 207.)

### TORTS.

See Damages, 5.

### TRADEMARKS.

1. TRADEMARKS—TRADE NAME—SIGNS.—One can have no property in the shape, size, color, or arrangement of signs relative to his business without regard to the letters which they bear. (*Cady v. Schultz*, 763.)

2. TRADEMARKS—TRADE NAMES—DISTINCTION.—A trademark is a symbol arbitrarily selected by a manufacturer or dealer,

and attached to his wares to indicate that they are his goods, but a trade name is descriptive of the manufacturer or dealer himself. No one else can use his trademark, even innocently, but one may use the same trade name as another, if he does not deceive the public and induce customers to mistake one for the other, in which case the fraudulent use of the name may be enjoined. (*Cady v. Schultz*, 763.)

3. TRADEMARKS—TRADE NAME—PHRASE AS TO DENTISTRY.—No one has a right to any exclusive use, on signs, of the words, "scientific dentistry at moderate prices." (*Cady v. Schultz*, 763.)

4. TRADEMARKS—TRADE NAME—"U. S."—"U. S. DENTAL ROOMS"—INJUNCTION.—If a dentist of several years' practice has used, as a trade name, the words, "United States Dental Association," and has displayed this name, or an abbreviation of it, upon signs at his place of business in a certain city within the state, and in advertisements and cards widely distributed through that city and others in the vicinity, and has branch offices in charge of assistants at places without the state, the use of the words, "U. S. Dental Rooms," and the use of the letters, "U. S.," upon the office windows of another person who has opened a dentist's office near the city in which the former has his main place of business, is a plain attempt to convey the idea that the business carried on there is a branch of the former's business, and should be restrained by injunction. (*Cady v. Schultz*, 763.)

#### TRESPASS.

TRESPASS—DISTURBING THATCH IN DIGGING FOR CLAMS.—It is not trespass to disturb a thatch in digging for clams on the shores of tide water, between high and low water mark. (*Allen v. Allen*, 738.)

See Actions.

#### TRIAL.

1. JURY TRIAL, DIFFERENCE BETWEEN CIVIL AND CRIMINAL CASES.—A distinguishing feature of trial by jury in criminal cases, as compared with trial by jury in civil cases, has always been the right of the jury to return a general verdict and such verdict as they may deem proper on the law and evidence without direction from the court. In a criminal case, the court can never assume the right to direct a verdict of guilty. (*State v. Main*, 30.)

2. JURY TRIAL, QUESTIONS WHICH THE COURT MAY DECIDE.—If a conclusion upon an issue of fact must be drawn from conflicting testimony, it must be submitted to the jury. (*Hogben v. Metropolitan etc. Ins. Co.*, 53.)

3. TRIAL—INSPECTION OF PREMISES BY JURY.—The jury may, in the discretion of the court, be permitted to visit the scene of the *res gestae* in criminal as well as civil cases, whenever it appears to the court that such visit is important for the elucidation of the evidence taken on the trial; but such visit must be jealously guarded, to prevent conversation with third parties, and no evidence must be taken, and, if taken, is ground for a new trial. (*State v. Perry*, 683.)

4. JURY TRIAL, RIGHT TO PASS UPON QUESTION WHETHER TREES WERE DISEASED.—If an owner of fruit trees is subjected to a criminal prosecution on the ground that they had "the yellows," and he had been ordered by the public inspector to



destroy them for that reason, such owner is justified in disobeying the order if the trees are not diseased, and is entitled to demand a trial by jury upon that question. (State v. Main, 30.)

**5. JURY TRIAL, RIGHT OF JURY TO DETERMINE THAT A DISEASE IS NOT CONTAGIOUS.**—If the legislature of the state has enacted a statute merely for the purpose of suppressing the disease known as "yellows," and the fact that there is such a disease is a matter of common knowledge, of which the court has a right to take judicial notice, a defendant prosecuted for violating such statute has no right to have the jury instructed that if they find that the "yellows" is not a contagious disease, spreading from one tree to another, and is not a public nuisance, then that the statute is an unwarrantable invasion of the rights and liberty of citizens. (State v. Main, 30.)

**6. JURY TRIAL, RIGHT OF JURY TO DETERMINE CONSTITUTIONALITY OF A STATUTE.**—Though a statute declares that the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict, it is not the duty of the jury to consider whether a statute relied upon is constitutional, but, upon that subject, they should follow the instruction of the trial judge. (State v. Main, 30.)

**7. JURY TRIAL, VERDICT CLAIMED TO BE DUE TO COERCION.**—Though a jury retires about 3 o'clock of one day and returns its verdict about 4 o'clock of the next, and it appears that the jurors had been informed that the judge was about to be absent for three days and that they would be kept together until his return, unless they agreed upon a verdict before he went away, it will not be presumed that the verdict was produced by coercion when the evidence to support it was ample. (State v. Smith, 219.)

**8. TRIAL—DISCHARGE OF JURY BEFORE VERDICT—DISCRETION OF COURT.**—A jury, in a criminal case, may be discharged when it is unable to agree upon a verdict, or when, from other causes, it becomes impossible to proceed to a verdict, and the accused may still be held for trial; but what facts will establish a necessity for discharging the jury rests in the discretion of the trial judge, which discretion is a judicial one, subject to review for manifest abuse. (State v. Nelson, 780.)

**9. PRACTICE—EVIDENCE RECEIVED WITHOUT OBJECTION.**—It is the duty of the trial court, in the absence of objections to the evidence or to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of action established by such evidence. (Bally v. Hornthal, 645.)

**10. TRIAL—WAIVER OF EXCEPTION.**—The defendant, by introducing evidence to contradict the case made by the plaintiff, waives an exception taken by him to the action of the court in overruling his motion made at the close of the testimony on behalf of the plaintiff to direct the jury to find for the defendant. (Gilbert v. Watts-DeGolyer Co., 154.)

See Appeal; Constitutions, 1-4; Former Jeopardy; New Trial.

## TRUSTS.

**1. WILLS.—A SECRET TRUST HAVING FOR ITS OBJECT THE CIRCUMVENTION OF THE STATUTE** prohibiting a devise or bequest to religious or charitable societies within a time specified prior to the death of the testator is void, and the trustee may be declared to hold the property for the next of kin of the testator. (Fairchild v. Edson, 609.)

**2. WILLS—SECRET FORBIDDEN TRUST, TITLE, WHEN VESTS IN THE TRUSTEE AND FOR WHAT PURPOSES.**—If a

will devise or bequeaths property to executors to hold without limitation or condition, but the action of the testatrix is induced by an understanding or promise that the property should be held as a secret trust for religious and charitable societies, the legal title to such property must be regarded as vesting in the executors, to be held by them for the next of kin. (*Fairchild v. Edson*, 609.)

**3. TRUSTS — FRAUDULENT CONDUCT — PRESUMPTION AGAINST TRUSTEE.**—Every presumption is indulged against a trustee who has personal dealings with the trust. Hence, if the conduct of the trustee, in relation to the trust property, is fraudulent in its tendency, as well as in its nature, its consequences, if injurious, are imputed to the trustee personally, and his estate will be held liable therefor. (*White v. Sherman*, 132.)

**4. TRUSTS — INVESTMENT OF FUNDS — SECURITIES OF PRIVATE BUSINESS CORPORATIONS.**—If there are no express directions in an instrument creating a trust, and no statutory provisions, in relation to the character of the securities in which trust funds may be invested, a trustee cannot invest such funds in stocks, bonds, or other securities of private business corporations. (*White v. Sherman*, 132.)

**5. TRUSTS—INVESTMENT OF FUNDS—REAL ESTATE OR GOVERNMENT SECURITIES—SPECULATIVE RISKS.**—In England, trustees are required to invest trust funds in real estate securities, or in the public securities of the British government. In this country, the same requirement, in regard to making investments in real estate securities or government securities, is generally recognized by the courts. At any rate, all speculative risks are forbidden (*White v. Sherman*, 132.)

**6. TRUSTS—INVESTMENT OF FUNDS—GOOD FAITH—SELECTION OF SECURITIES.**—A trustee, in the investment of trust funds, must not only act in good faith and use sound discretion and reasonable vigilance, but, where he is appointed by a court, and acting under its directions, he must select such securities as the court will approve. (*White v. Sherman*, 132.)

**7. TRUSTS—INVESTMENT IN TRUSTEE'S OWN NAME—CONVERSION—ACCOUNTING.**—Whatever the actual intention of a trustee may be, if he invests trust money in his individual name, he commits a breach of trust, which subjects him to the same liability as if there had been a willful conversion to his own use. In such cases, a strict accounting will be exacted from him. (*White v. Sherman*, 132.)

**8. TRUSTS—CONVERSION—BREACH OF TRUST—TRACING FUNDS—ELECTION OF CESTUI QUE TRUST.**—If a trustee has, in fact, converted trust funds to his own use, or has, without authority, invested them in any other property into which they can be distinctly traced, the cestui que trust has an election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of trust. (*White v. Sherman*, 132.)

**9. TRUSTS—BREACH OF TRUST—ACQUIESCENCE—WHAT IS NOT.**—A trustee cannot escape liability for a breach of trust by imperfect information concerning his acts, or by merely informing the cestui que trust that he has committed a breach of trust. They must all concur in their acquiescence in order to protect him, and he is not exonerated where some of them are not sui juris, as mere knowledge and noninterference by a cestui que trust before his interest has come into possession do not always bind him as acquiescing in the breach of trust. (*White v. Sherman*, 132.)

**10. TRUSTS—BREACH OF TRUST—ACQUIESCENCE—WHEN BINDING—BURDEN OF PROOF.**—Acquiescence does not release a trustee from being answerable for a breach of trust, unless the



cestui que trust has full knowledge of the particular transaction constituting the breach of trust, and of his legal rights in the premises, and is under no disability to assert them. There must be full and satisfactory proof that the cestui que trust has acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be impeachable. (*White v. Sherman*, 132.)

**11. TRUSTS—BREACH OF TRUST—INVESTMENT IN STOCKS—ACCOUNTING—INTEREST.**—If a trustee commits a breach of trust by investing trust moneys in railroad stocks, without authority, he is chargeable, upon an accounting in equity, to the cestui que trust, with interest on the sums invested, at legal rates, with annual rests, from the date of the investments, less deductions for all dividends received with like interest. (*White v. Sherman*, 132.)

**12. TRUSTS—WHAT ACQUIESCENCE DOES NOT BIND REMAINDERMAN.**—As a general rule, acquiescence, in a breach of trust, by a tenant for life, or by a cestui que trust for life, does not bind the person entitled to the remainder. (*White v. Sherman*, 132.)

**13. TRUSTS—ACQUIESCENCE IN PURCHASE OF RAILROAD STOCKS—WHAT IS NOT.**—Acquiescence of cestuis que trust in the trustee's purchase of fluctuating railroad securities is not shown by the fact that the trustee, in an interview with some of the beneficiaries, made some statement about the difficulty of lending the trust moneys, and suggested the purchase of railroad stocks therewith, to which one beneficiary, with the concurrence of the others, replied that the trustee should "use his own judgment." As the trustee is not thus authorized by the beneficiaries to invest in railroad securities, they are not estopped to treat each purchase as a breach of trust and to call for an accounting. (*White v. Sherman*, 132.)

**14. TRUSTS—INVESTMENTS—STOCKS—AVOIDING DIRECTION OF COURT.**—It is the duty of a trustee appointed by the court to execute the provisions of a will to call for the direction of the court, when necessary, in the matter of investing the funds of the trust estate. He cannot, therefore, justify the purchase of railroad stocks, with such funds, in his own name, without such direction, by showing that it might be necessary to dispose of the stocks quickly, and before an order of the court could be obtained. (*White v. Sherman*, 132.)

**15. TRUSTS—COMMISSIONS ON INSURANCE PREMIUMS—TRUSTEE CANNOT PROFIT BY.**—If a trustee holds trust property to be insured and joins an underwriters' association for the purpose of obtaining a commission on the premiums paid for such insurance, he will not be allowed to profit by the arrangement, although the trust estate does not suffer, but must account, as trustee, for such commission, less the fees paid for his membership in the association. (*White v. Sherman*, 132.)

**16. WILLS, TRUSTS, ESTABLISHING BY EXTRINSIC EVIDENCE.**—If a testatrix bequeaths property to her executors, saying in her will that she gives it to them without restriction or condition, and that, in the use of the same, she believes they will carry out her wishes, extrinsic evidence is admissible to prove that such executors, or some of them, had an understanding with her that the property so bequeathed should be given by them to certain religious and charitable societies to which she could not give it, because her death would probably occur within less than two months after the execution of her will. Such understanding being proved, the property so devised or bequeathed must, as against persons accepting it with notice, be deemed held for the next of kin. (*Fairchild v. Edson*, 609.)



**17. CORPORATIONS, VOID BEQUEST OR DEVISE TO CAN-**  
**NOT BE HELD BY THEIR OFFICERS.**—If a will provides that if  
 for any cause any society or corporation shall be unable to take the  
 legacy intended for it, then such legacy is bequeathed to its presi-  
 dent or chief executive officer, by him to be applied to the uses and  
 purposes of such society or corporation, the trust thus attempted to  
 be created is within the statute condemning as unlawful every re-  
 straint of the absolute ownership of property not measured by lives  
 in being, and also because it involves a bequest to societies unincor-  
 porated or otherwise incapable of taking. (*Fairchild v. Edson*, 609.)

See Corporations, 12, 13; Judgment, 9; Wills, 13.

#### ULTRA VIRES.

See Corporations, 3.

#### VARIANCE.

See Pleading, 3.

#### VENDOR AND PURCHASER.

**1. VENDOR'S LIEN.**—THE ASSIGNMENT OF A NOTE given  
 for the purchase price of real property vests in the assignee a ven-  
 dor's lien existing to secure the payment of such note. (*National  
 Bank of Commerce v. Lock*, 923.)

**2. VENDOR AND PURCHASER, REPRESENTATIONS, WHEN  
 ACTIONABLE.**—A representation of a vendor of a bond that it was  
 secured by machinery and real estate of the value of half a million  
 dollars cannot be regarded or excused as one of those generalities  
 which, whether true or not, are to be expected from one who wishes  
 to sell his goods, and, if the representation is fraudulent and induces  
 the plaintiff to make a bargain different from the one which he  
 thought he was making, it is actionable. It is not essential that the  
 representation should have been intentionally fraudulent, if it was  
 known to be false and was made with intent to bring about the sale.  
 (*Whiting v. Price*, 307.)

**3. NEGLIGENCE—DEFECTS IN BUILDINGS—CHANGE OF  
 OWNERSHIP.**—A grantee who acquired title and took possession of  
 real estate, on which was an obviously defective structure, on the  
 day before an accident resulted from neglect to repair such structure,  
 is liable therefor. In such case the grantor is not liable. (*Palmore  
 v. Morris, Tasker & Co.*, 693.)

**4. NEGLIGENCE—DEFECTS IN BUILDINGS—CHANGE OF  
 OWNERSHIP—DUTY TO REPAIR.**—It is presumed that a grantee,  
 before purchasing real estate, examined it and was cognizant of its  
 situation and surroundings, and the character of the structures upon  
 it, and their obvious condition of repair, and without an express  
 covenant by the grantor there is no duty on his part to repair. The  
 purchaser assumes that duty upon taking possession, and is there-  
 after liable for all injury resulting from neglect to make necessary  
 repairs. (*Palmore v. Morris, Tasker & Co.*, 693.)

#### VOLUNTEERS.

See Subrogation, 1.

#### WAIVER.

See Insurance, 21, 24; Sales, 4; Trial, 10.

#### WARRANTIES.

See Insurance, 17, 25, 26; Sales, 4.

## WATERS.

1. **WATERS.—THE RIGHT TO APPROPRIATE WATER APPLIES ONLY** to the public lands, and cannot be exercised to the prejudice of the rights of riparian proprietors. (*Benton v. Johncox*, 912.)

2. **RIPARIAN PROPRIETORS—CONFLICT BETWEEN AND APPROPRIATORS OF WATERS ON THE PUBLIC LANDS.**—As between an appropriator of water on the public lands and a patentee from the United States, the title of the latter relates back to the first necessary proceeding on his part to acquire title to his land. (*Benton v. Johncox*, 912.)

3. **RIPARIAN OWNERS—RIGHTS OF NOT MODIFIED BY THE ARIDITY OF THE COUNTRY.**—By adopting the common law so far as not inconsistent with the constitution and laws of the United States nor incompatible with the constitution and condition of society in the state, the legislature of the state of Washington adopted as a part of the law of the state the common-law rules respecting the rights of riparian owners, though in a large portion of the state the climate is arid and the soil incapable of profitable cultivation without the aid of irrigation. (*Benton v. Johncox*, 912.)

4. **WATERS—SHORE OF TIDE WATER—RIGHT OF RIPARIAN PROPRIETOR.**—A riparian proprietor whose land borders upon tide water has a right in the nature of a franchise or easement in the shore between high and low watermark. (*Allen v. Allen*, 738.)

5. **THE RIGHT OF A RIPARIAN OWNER TO THE USE OF WATER** as it is accustomed to flow without diminution or alteration is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes. (*Benton v. Johncox*, 912.)

6. **RIPARIAN OWNERS—RIGHTS OF AS TO WATER.**—The right of a riparian owner to the natural flow of a stream by or across his land in its accustomed channel as incident to his estate passes by a grant of the land, unless specially reserved. It is not an easement in, nor an appurtenant to, the land, but is as much a part of the soil as the stones scattered over it. (*Benton v. Johncox*, 912.)

7. **RIPARIAN OWNERS, RIGHTS OF IN NAVIGABLE WATERS.**—Although, as against individuals and the unorganized public, riparian owners have special rights to the tideway that are governed and protected by law, as against the general public as organized and represented by the government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by grant or covenant on the part of the state. (*Sage v. Mayor*, 592.)

8. **NAVIGABLE STREAMS, RIGHTS OF OWNERS OF LAND FRONTING UPON.**—Persons owning lands fronting upon navigable streams are entitled, as against all but the sovereign as trustee of the people at large, to certain valuable privileges or easements, including the right of access to the part of the stream in front thereof, for the purpose of loading and unloading boats, nets, and the like. (*Sage v. Mayor*, 592.)

9. **THE RIGHT OF A RIPARIAN OWNER TO HAVE THE WATER FLOW** through his lands cannot be prejudiced by an act of the legislature passed after the inception of his title. (*Benton v. Johncox*, 912.)

10. **WATERS—SHORE OF TIDE WATER—FEE OF. IS IN THE STATE.**—The fee of the shore on tide water between high and low water mark is in the state as trustee for the public. (*Allen v. Allen*, 738.)

**11. NAVIGABLE WATERS, LANDS BENEATH ADJOINING THE CITY OF NEW YORK.**—By what are known as the Dongan and Montgomerie charters, as confirmed by the first constitution of the state of New York, there vested in the city of New York all the surrounding land beneath high and low water mark. (*Sage v. Mayor*, 592.)

**12. RIPARIAN RIGHTS IN SUBMERGED SOIL.**—A riparian owner whose land is submerged by water does not lose his property therein if he afterward reclaims it, either by natural or artificial means; nor does lapse of time during submersion bar the owner's right to reclaim the land. (*City of Chicago v. Ward*, 185.)

**13. NAVIGABLE WATERS—RESERVATION IMPLIED IN GRANTS OF LAND FRONTING UPON.**—In every grant of lands bounded by navigable waters, where the tide ebbs and flows, made by the crown or the state as trustees for the public, there is reserved, by implication, the right to so improve the waterfront as to aid navigation, for the benefit of the general public, without compensation to the riparian owner. (*Sage v. Mayor*, 592.)

**14. RIPARIAN OWNERS, RIGHTS OF ARE SUBORDINATE TO THE RIGHT TO MAKE PUBLIC IMPROVEMENTS.**—When the interest of the whole people requires the improvement of the waterfront for the benefit of navigation and commerce, it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvement upon the waterfront for that purpose without compensating the riparian owner, other than by giving him a pre-emptive right of purchase in case of a sale. (*Sage v. Mayor*, 592.)

**15. ACCRETIONS—LANDS RECLAIMED BY ACT OF MAN.**—The doctrine of accretions does not apply to land reclaimed by man through filling in land once under water. The title to land so filled in remains where it was before, unless the filling in was done wrongfully. (*Sage v. Mayor*, 592.)

See Boundaries, 1, 2.

## WILLS.

**1. WILLS.—THAT A WILL IS UNJUST to the testator's relatives and inconsistent with natural justice is not sufficient to justify a refusal to admit it to probate.** (*Kaufman v. Caughman*, 808.)

**2. WILLS—TESTATOR'S CAPACITY.—THE OMISSION OF A CHILD of the testator from his will is no ground for impeaching his capacity.** (*Kaufman v. Caughman*, 808.)

**3. WILLS—SIGNATURES OF THE WITNESS MADE BEFORE THAT OF THE TESTATOR.**—If one of the subscribing witnesses to a will testifies that they signed it before the testator and the others that they signed it afterward, it may properly be received in evidence, for upon this conflicting testimony it is for the jury to determine which is true. (*Kaufman v. Caughman*, 808.)

**4. WILLS—SIGNING BY TESTATOR AND BY WITNESSES, ORDER OF.**—The order of signing a will by the testator and the witnesses is not material, if substantially contemporaneous. Hence the fact that one of the witnesses signed before the testator does not invalidate the will, if all signed at the same interview, each immediately succeeding the other. (*Kaufman v. Caughman*, 808.)

**5. WILLS—EXECUTION AND ATTESTATION OF.**—If a testator, being ill and unable to leave his bed, signs his will in the presence of subscribing witnesses, who thereupon withdraw to another room, no part of which is visible from any part of the room in which he is, and there subscribe it as witnesses, and then return to the testator and inform him that they have signed his will, and show him



their signatures, and he assents thereto, such will is not executed as required by a statute demanding that it be signed by the testator, and attested and subscribed in his presence by three or more competent witnesses. (*Mendell v. Dunbar*, 277.)

6. WILLS—REVOCATION OF BY MARRIAGE OF A MAN.—Though a state statute provides in the event of a husband dying intestate his property shall descend to his children and to the lawful issue of any deceased child by right of representation, but if there be no child and no lawful issue of a deceased child, then to the surviving wife, the marriage of a man does not revoke by implication a prior will. (*Hulett v. Carey*, 419.)

7. WILLS—REVOCATION OF.—THE MARRIAGE OF A MAN did not by the common law revoke a previous will in regard to either real or personal estate. (*Hulett v. Carey*, 419.)

8. WILLS, BENEFICIARIES, DESIGNATING OF, WHAT NECESSARY.—The beneficiaries in a will must be so designated that if the executors or trustees to whom the fund is given should die before the execution of the trust, the court could distribute the fund among the persons entitled thereto. (*Fairchild v. Edson*, 609.)

9. WILLS—LIFE ESTATE WITH POWER OF DISPOSITION. A life estate may be created by will with power to dispose of the fee, and limit a remainder after the termination of the life estate. The power of absolute disposition annexed to a life estate does not enlarge it into an estate in fee. (*Skinner v. McDowell*, 183.)

10. WILLS—LIFE ESTATE WITH POWER OF DISPOSITION—REMAINDER.—A clause in a testator's will leaving his property to his wife "to be sold, retained and exchanged, used and managed by her as she may think proper, during her life, and in case anything may be left after her death, she shall make some arrangement to have it equally divided among our children," passes a life estate to the wife, with remainder to the children, but with power in the wife to dispose of the fee. Without any disposition of the property made by her during her life the property is not subject thereafter to be levied upon by her creditors. (*Skinner v. McDowell*, 183.)

11. WILLS—BEQUEST TO EXECUTORS, WHEN ABSOLUTE. A bequest to executors of all legacies which should lapse, fail, or for any cause not take effect, stating that, in the use of them, the testatrix is satisfied the executors would follow what they believe to be her wishes, that she imposes on them no conditions, and leaves the same to them personally without restriction or condition, is an absolute gift to such executors as individuals, and therefore cannot be void as creating a prohibited trust. (*Fairchild v. Edson*, 609.)

12. WILLS, BEQUEST OF A FUND TO EXECUTORS TO BE DIVIDED BY THEM.—A bequest to the testatrix's executors of a fund to be divided by them among such religious, benevolent, and charitable societies of the city of New York and in such amounts as shall be fixed by them with the approval of W. R. H. is void, because the beneficiaries are not so designated that the court could execute the trust if the executors should refuse to do so, or should all die before such execution. (*Fairchild v. Edson*, 609.)

13. WILLS—SECRET TRUST—UNDERSTANDING BETWEEN A TESTATRIX AND ONE OF SEVERAL LEGATEES.—If property is devised or bequeathed to several as tenants in common, because of an understanding between the testatrix and one of them that such property shall be held as a secret trust for the benefit of religious and charitable societies, the legatees who do not participate in the understanding are not bound by it, and can therefore retain their share of the legacies. (*Fairchild v. Edson*, 609.)

14. WILLS—SANITY.—THE OPINION OF THE SUBSCRIBING WITNESSES respecting the sanity of the testator at the time

of the execution of the will is admissible in evidence. (*Kaufman v. Caughman*, 808.)

**15. WILLS—PRESUMPTION OF TESTAMENTARY CAPACITY.** It is not incumbent upon the proponent of a will to prove the sanity of the testator. If there is evidence of the formal execution of the will, including the attestation and subscription of the witnesses, as required by law, the presumption of testamentary capacity arises. (*Kaufman v. Caughman*, 808.)

**16. WILLS—DECLARATIONS OF TESTATOR IN SUPPORT OF.**—Declarations of a testator in conformity with the provisions of his will are admissible in proof of his assent. (*Kaufman v. Caughman*, 808.)

**17. WILLS—DECLARATIONS OF TESTATOR, WHEN ADMISSIBLE.**—To rebut the idea of fraud or of undue influence or to show that the will is the result of the deliberate mind of the testator, his previous declarations, consistent with the will, are admissible in evidence. (*Kaufman v. Caughman*, 808.)

**18. WILLS.—THE DECLARATIONS OF A TESTATOR MADE AFTER THE EXECUTION** of his will are not admissible to prove undue influence, where there is no evidence of external acts having a tendency to control the free agency of the testator. (*Kaufman v. Caughman*, 808.)

See Corporations, 34; Powers, 2.

#### WITNESSES.

**1. EVIDENCE OF GOOD CHARACTER OF WITNESS, WHEN INADMISSIBLE.**—Though testimony has been received tending to prove that a witness has made contradictory statements, he cannot be supported by evidence of his good character. (*State v. Rice*, 816.)

**2. WITNESS, LIVING, TESTIFYING AGAINST DECEASED—WRITTEN ADMISSIONS.**—The statute of Minnesota declaring that it shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with, or admissions of, a deceased person relative to any matter in issue between the parties, refers only to spoken words. A party may, therefore, be permitted to testify to the writing of a letter in the presence of a deceased and handing it to him to read, and that he read it and subsequently mailed it, if such letter is also produced in evidence, in which event, statements therein contained may be regarded as admissions of the decedent. (*Hulett v. Carey*, 419.)

**3. EVIDENCE, WAIVER OF ERROR IN OVERRULING OBJECTION TO.**—If, after evidence is offered and an objection thereto is sustained, the counsel offering it states what he wishes to prove thereby, and his adversary thereupon withdraws the objection, or offers to do so, and the counsel whose witness is under examination refuses to proceed further with his question, he must be deemed as having waived his right to examine the witness respecting thereto. (*State v. Smith*, 219.)

**4. PUBLIC OFFICER, EVIDENCE OF, WHEN RECEIVABLE AS AN EXPERT.**—One who is shown to have occupied a public office for a month, and whose duties as such required him to visit and examine fruit trees for the purpose of determining whether they were diseased by "the yellows," is entitled to give evidence as an expert respecting the question whether certain trees examined by him were subject to that disease. (*State v. Main*, 30.)

**5. WITNESSES—EXPERTS—CREDIBILITY.**—An expert witness is to be judged from the same standpoint as any other witness, and credibility is a question for the jury, not for the court. It can-

not be assumed, as a matter of law, that expert testimony is open to suspicion for the reason that experts are employed, and are necessarily biased by such employment, or because they differ in their testimony. (*People v. Seaman*, 326.)

6. WITNESSES — EXPERTS — HYPOTHETICAL QUESTIONS. One who seeks the opinion of an expert may, within reasonable limits, put his case hypothetically, as he claims it to have been proved, and take the opinion of the witness thereon, leaving the jury to determine whether the case as put is the one proved. (Grand Lodge I. O. M. A. v. *Wieting*, 123.)

7. WITNESSES — INSANITY — NONEXPERT, WHEN INCOMPETENT.—If the sanity of a deceased person is in question, a non-expert witness who had but a passing acquaintance with him, and who had not spoken to him for eight months or a year prior to his death, is incompetent to testify on the point, for want of sufficient knowledge of the acts and conduct of the deceased. (Grand Lodge I. O. M. A. v. *Wieting*, 123.)

8. WITNESSES — INSANITY — COMPETENCY OF NONEXPERTS.—A nonexpert witness may be heard upon the question of insanity, but his competency to express an opinion must first appear, and whether he is competent or not is a question for the court. (Grand Lodge I. O. M. A. v. *Wieting*, 123.)

**See Appeal, 9; Constitutions, 2-4; Depositions; Evidence, 18.**







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